Retiree-only plans

Overview

Guidance was issued by the Internal Revenue Service (IRS), Department of Labor (DOL) and the Department of Health and Human Services (HHS) agencies indicating that "retiree-only plans" are exempt from many of the new benefit mandates under the Patient Protection and Affordable Care Act (PPACA) (and several other group health plan requirements under HIPAA, e.g., the mental-health parity requirements). 75 Fed. Reg. 34538, 34539-40. This guidance is critical since many new PPACA mandates with premium impact apply to group health plans beginning September 23, 2010. For example, there are restrictions on the lifetime and annual limits for essential benefits under a group health plan and coverage must be available for adult children up to age 26.

The following questions and answers are designed to provide general information regarding the retiree-only plan exemption. This is not intended to provide legal advice, and employers should seek their own legal counsel with regard to these issues.

Questions and answers:

How is a retiree-only plan defined in order to be exempt from many of PPACA’s mandates (and several other group health plan requirements under HIPAA)?

A retiree-only plan that is exempt from PPACA’s mandates for a particular plan year is defined as any group health plan (and group health insurance coverage offered in connection with a group health plan) with less than two participants who are current employees. See ERISA §732(a) and IRC §9831(a)(2).

Do all participants in the plan have to be retirees? Are non-retiree dependents allowed to be covered under a retiree-only plan?

While all participants have to be retirees, a retiree-only plan may cover non-retiree dependents of the retiree and still be considered a retiree-only plan even if the dependents are active employees of the employer in question. Dependents are considered beneficiaries, not participants.

Is the retiree-only exemption available for self-funded and insured plans?

Yes, the retiree-only exemption applies to both self-funded and insured plans. PPACA technically eliminates the exemption in the Public Health Services Act (PHSA) for "plans with less than two participants who are current employees" but preserves the exemption under the parallel provisions in ERISA and the Internal Revenue Code (Code).

The PHSA is applicable to governmental plans and to issuers of insured plans. The preamble to the PPACA grandfathering Interim Final Regulation, however, confirms that the retiree only plan exemption under ERISA and the Code has been preserved, and also provides that, even though the exemption was technically eliminated from the PHSA: (1) HHS will not enforce the requirements of HIPAA or PPACA with regard to non-federal governmental retiree only plans, and (2) states are encouraged not to apply the provisions of PPACA to issuers of retiree-only plans (i.e., insured plans). 75 Fed. Reg. 34538, 34540.

From which PPACA mandates are retiree-only plans exempt?

Retiree-only plans are exempt from the PPACA mandated “insurance market reforms” listed below:

- Section 2711 - No lifetime or annual limits
- Section 2712 - Prohibition on rescission
- Section 2713 - Coverage of preventive health services
- Section 2714 - Extension of dependent coverage
- Section 2715 - Development and utilization of uniform explanation of coverage documents and standardized definitions
- Section 2715A - Provision of additional information
- Section 2716 - Prohibition on discrimination in favor of highly compensated individuals for insured plans
- Section 2717 - Ensuring the quality of care reporting
- Section 2718 - Medical loss ratio restrictions
- Section 2719 - Required appeals process
- Section 2719A - Patient protections (selecting providers and ER services)
- Section 2794 - Rate review
- Section 2704 - Prohibition of preexisting condition exclusions or other discrimination based on health status
- Section 2701 - Restrictions on what criteria can be used in rating and rate band limits
- Section 2702 - Guaranteed issue
- Section 2703 - Guaranteed renewability
It is unclear to what extent other PPACA provisions apply to retiree-only plans. For example, the excise tax on high-cost employer-sponsored health coverage (PPACA § 9001; new Code § 4980I) applies to "qualified retirees."

Who are current employees for purposes of the retiree-only exemption?

The HIPAA regulations do not provide any guidance defining who is a current employee for purposes of the retiree only plan exemption. However, a retiree who is rehired as an employee (and receives either a W-2 or 1099 for the year) should be treated as a current employee that counts against retiree only plan status and should be covered under the ERISA plan maintained for purposes of current (i.e., active) employees immediately upon rehire.

HHS issued a FAQ indicating that the retiree-only exemption may be available for plans that cover both retirees and persons on long-term disability (LTD). Until further guidance is issued, HHS will treat such plans as satisfying the retiree-only exemption. To the extent future guidance on this issue is more restrictive with respect to the availability of the retiree-only exemption, the guidance will be prospective, applying to plan years that begin some time after its issuance.

What will Aetna require from plan sponsors in order to demonstrate that they have established a retiree-only plan that satisfies the exemption?

For ERISA plans, Aetna will require an annual certification from the plan sponsor that it maintains a separate plan document, a separate summary plan description (SPD) and files a separate Form 5500 to establish that a plan is a retiree-only plan that satisfies the exemption. As part of the certification process, Aetna will request a copy of the separate Form 5500 and SPD as soon as they become available.

For plan sponsors that do not currently maintain a separate retiree-only plan but intend to establish one on a prospective basis for the following plan year, Aetna will require certification from the plan sponsor attesting that they will be establishing a retiree-only plan with a separate plan document and that they will provide Aetna with a copy of the separate Form 5500 and SPD as soon as they become available.

For non-ERISA plans (for example, government plans), Aetna will require an annual certification from the plan sponsor that it has established (or will be establishing on a prospective basis) a retiree-only plan that satisfies the exemption (i.e., the plan has less than two current/active employees). Because non-ERISA plans do not file a Form 5500 or maintain SPDs as required by ERISA, as part of the certification process Aetna will require formal documentation describing the plan’s eligibility rules.

* A Form 5500 is only required for Welfare plans with 100 or more participants at the beginning of the plan year.

Note: Absent the required certifications and applicable documentation from the plan sponsor, Aetna will apply the PPACA insurance market reforms to the plan.

What will happen if a plan sponsor does not amend its plan to carve out retirees into a separate retiree-only ERISA plan?

If a plan sponsor continues covering current employees and retirees under the same ERISA plan, it is likely that the retiree-only plan exemption will not be met. This means that PPACA’s requirements will apply. Plans that are not exempt from PPACA still may be “grandfathered” if they were in effect on March 23, 2010 and meet the criteria in PPACA for grandfathered status. Grandfathered plan are subject to some but not all of the PPACA mandates.

Can a plan sponsor amend its plan to carve out retirees into a retiree-only plan and preserve the grandfather status of the plan for current (i.e., active) employees?

During a phone conference, regulators confirmed that amending a plan to carve out retirees into a separate retiree-only plan, provided no changes are made to the benefits or cost sharing for current (i.e., active) employees, will not impact the grandfathered status of the plan for current (i.e., active) employees, so long as the new separate retiree-only plan is created as the new plan in the sequence. The grandfathered plan Interim Final Regulations contain complex anti-abuse rules for changes in plan eligibility, but these rules apply only where the individuals transferred into another plan are employees, not retirees. 45 C.F.R. §147.140(b)(2)(i).

How does the retiree-only exemption relate to the Retiree Drug Subsidy Program (RDS) and Early Retiree Reinsurance Program (ERRP)?

A plan may receive reimbursements under the ERRP or subsidies under the RDS regardless of whether it meets the retiree-only plan exemption for HIPAA (and PPACA) purposes.