Medicare Part D: Employers Must Comply With The New Regulations This Fall

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The new federal Medicare Part D prescription drug program takes effect on January 1, 2006, and employers (including governmental entities and unions) that offer prescription drug coverage for employees or retirees must take steps now to comply with the Medicare Part D Regulations (the Regulations). The final Regulations were issued in January 2005 pursuant to the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA). Under the Regulations, individuals eligible for Medicare Part D coverage who maintain employer prescription drug coverage (instead of enrolling in Medicare Part D prescription drug coverage), can enroll later in Part D coverage without an increased premium if the employer prescription drug plan was "creditable" or at least equivalent to Standard Medicare Part D coverage.

Thus, employers that offer active employee or retiree prescription drug plans must test their plans in comparison to Standard Medicare Part D coverage and provide plan participants and the Centers for Medicare and Medicaid Services (CMS) with notice that the plan coverage is "creditable" (at least "actuarially equivalent") or "non-creditable" (less than "actuarially equivalent") to Medicare Part D coverage. This notice must be provided prior to November 15 of each year, beginning this year. In addition, employers that have "creditable" retiree prescription drug plans must

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decide immediately (in consultation with a qualified actuary) whether to apply for the new Medicare prescription drug subsidy available for each individual who opts for the employer or union coverage in lieu of Medicare Part D coverage; the subsidy application must be filed with CMS by September 30 of this year for the 2006 plan year, and at least 90 days prior to January 1 for subsequent years.

The Notice Requirement

Employers that offer prescription drug coverage to retirees or active employees must provide a notice that coverage is "creditable" (at least "actuarially equivalent") or "non-creditable" (less than "actuarially equivalent") compared to Medicare Part D coverage prior to November 15, 2005, the beginning of the initial annual enrollment period for Medicare Part D coverage. The initial notice requirement purports to apply only to individuals who are covered by Part A or Part B of Medicare ("Medicare Part D Eligible Individuals" including employees or employee spouses or dependents who are covered by Medicare A or B). Nonetheless, notices should be distributed to all plan participants annually prior to November 15 of each year (the beginning of the annual Part D enrollment period), prior to a participant's initial enrollment in the plan, upon request of an individual covered by Medicare Parts A or B or whenever prescription drug coverage ends or changes so that it is no longer "creditable" or becomes creditable, in order to meet the various timing requirements for the distribution of these notices. In addition, CMS recommends that employers simplify the notice distribution process by including the notices in plan materials normally distributed to individuals each year and upon enrollment, such as a Summary Plan Description (SPD) or similar document.

The determination of whether prescription drug coverage is creditable or non-creditable must be based on one of three formulas provided in the Regulations and May 2005 CMS Creditable Coverage Guidance: (1) the gross value test; (2) the safe harbor test; or (3) the gross value and net value tests. An employer should use the gross value test or the safe harbor test if: (1) it only desires to make the creditable coverage determination and not apply for the subsidy discussed below; or (2) it only has an active employee plan and seeks to determine whether prescription drug coverage is creditable to fulfill the notice requirement. In contrast, an employer that offers retiree prescription drug coverage and desires to apply for the subsidy must hire a qualified actuary to certify that the coverage is creditable under the gross value and net value tests set forth in the Regulations.

The Subsidy Application

Employers that offer retiree prescription drug coverage are only eligible for the subsidy if a qualified actuary certifies that this coverage is creditable (as discussed above), and the employer submits an application to CMS including this actuarial certification. The nontaxable subsidy reimburses an employer for 28% of the "allowable retiree costs" between $250 and $5,000 for each Medicare Part D eligible retiree who maintains participation in the employer's prescription drug program instead of enrolling in Part D. In deciding whether to apply for this subsidy, an employer should consider the financial benefit it would receive from the subsidy in comparison to the costs of reporting and subsidy administration.

Regardless of whether an employer opts to apply for the subsidy, it can use the actuarial determination that its retiree coverage is creditable (or non-creditable as the case may be) as the basis for the required notices of creditable or non-creditable coverage for the retiree prescription drug plan tested.

Action Steps For Employers

Employers that offer retiree prescription drug coverage should contact a qualified actuary *immediately* to conduct the necessary testing for the subsidy application due September 30, 2005. If coverage is found to be creditable, the employer must decide whether to apply for the subsidy and submit the subsidy application.

Employers that have active or retiree prescription drug coverage (that do not wish to conduct the more elaborate actuarial testing needed for the retiree prescription drug subsidy application) should consult with their prescription drug insurer and/or an actuary *immediately* to ensure proper testing of the plans.

Employers that have active employee or retiree prescription drug coverage should have the necessary notice of creditable or non-creditable coverage prepared by legal counsel and incorporated in annual plan materials. This information *must* also be distributed to participants and filed with CMS before November 15, 2005.

Employers should train benefits personnel in Medicare Part D compliance and present educational programs for plan participants discussing the Medicare Part D program to show how employer-provided coverage compares with Part D coverage and the consequences to the participant if he or she elects the employer's prescription drug coverage instead of Part D.

***Amanda Layton** is a Partner in the Employee Benefits Practice Group of WolfBlock and may be reached at (215) 977-2613.* Employers that maintain prescription drug coverage need to act immediately to meet the impending deadlines for Medicare Part D compliance. WolfBlock will provide a Medicare Part D compliance package for employers tailored to meet the particular client's needs. This service is available through WolfBenefits Solutions.

Please email the author at alayton@wolfblock.com with questions about this article.

Upcoming Merger Or Acquisition? Don't Forget Employee Benefits

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In today's business climate, more and more employers are expanding their business through mergers or acquisitions. There are many issues to be considered as the details of a transaction are negotiated and implemented. Without proper planning, changes in corporate structure or the sale of a division can wreak havoc on a carefully crafted HR strategy.

With a little attention to detail, however, a company (Buyer) seeking to purchase a new business (Target) can both: (1) assemble a post-transaction benefits and compensation package that is key to the new organization's ability to attract and retain top talent; and (2) eliminate the possibility that a "hidden" liability may arise after the transaction. Further, a company seeking to divest of a business (Seller) can ensure that any liabilities associated with Target employees are assumed by Buyer, so that Seller can close the books and move forward.

The following are examples of some of the issues that an employer contemplating a merger or acquisition (either Buyer or Seller) should consider:

Qualified Retirement Plans

• Does Target maintain a defined benefit plan? If so, what entity will have responsibility for the plan post-transaction? If Buyer is to acquire a defined benefit plan that is not fully funded, it generally also will be assuming the responsibility to fully fund all benefits due under the plan. This should be taken into account in determining the purchase price. Additionally, certain events that occur in the context of a transaction must be reported in advance to the Pension Benefit Guaranty Corporation (PBGC).

• Will the employees of Target receive benefits under a defined contribution or 401(k) plan after the transaction closes? If so, the Buyer will need to analyze how the new employees will impact the plan's nondiscrimination test results. This analysis may include consideration of the "controlled group" rules. The Seller may wish to be relieved of the responsibility for maintaining plan accounts for the Target employees who will leave its employment as a result of the transaction. Depending on the circumstances, this may be best achieved by a transfer of assets directly between the Seller's plan and the Buyer's plan. Alternatively, it may be better to simply allow Target's employees the ability to roll over an account balance from the Buyer's plan to the Seller's plan.

Health And Welfare Issues

• Will any Target employees become eligible for COBRA coverage as a result of the transaction? Are there any individuals who are eligible for COBRA independent of the transaction (for example, divorced former spouses) who will continue to be COBRA-eligible after the transaction? If so, will that coverage be provided under Buyer's or Seller's health plans? Although COBRA provides rules assigning responsibility to provide coverage in the context of a merger or acquisition, the parties are free to change these rules by agreement.

• Does Target offer health or other welfare benefits to retirees? If so, will these responsibilities belong to Buyer or Seller after the transaction? If the Buyer is to assume liability for providing these benefits, it will wish to perform due diligence on these benefits (by reviewing all of Seller's plan documents, summary plan descriptions and participant communications) to determine whether these benefits may be modified or terminated, or whether the retirees have vested in these benefits and acquired the right to receive them for life.

Executive Compensation

• Will the transaction trigger change-in-control or other severance payable to Target's executives? If payment of such benefits will significantly reduce Target's net worth, Buyer should take this into account in negotiating the purchase price.

• Will the transaction trigger payment of benefits under Target's nonqualified deferred compensation plans? Is there any way that the payment of benefits may be avoided? What is the impact of the new changes in the tax law made by the addition of Section 409A of the Internal Revenue Code of 1986, as amended (the Code) pursuant to the American Jobs Creation Act of 2004?

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