HUNTON& WILLIAMS

CLIENT ALERT

June 2010

Contacts

Dallas Office
1445 Ross Avenue, Suite 3700
Dallas, Texas 75202-2799
(214) 979-3000

L. Scott Austin*
saustin@hunton.com

Baker R. Rector
brector@hunton.com

Henry Talavera
htalavera@hunton.com

James A. Deets
jdeets@hunton.com

McLean Office
1751 Pinnacle Drive, Suite 1700
McLean, Virginia 22102
(703) 714-7400

David A. Mustone
dmustone@hunton.com

Christina M. Crockett
ccrockett@hunton.com

New York Office
200 Park Avenue
New York, New York 10166-0091
(212) 309-1000

John T. Konther
jkonther@hunton.com

Leslie A. Okinaka
lokinaka@hunton.com

Leslie S. Hansen
lhansen@hunton.com

Richmond Office
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8200

Mark S. Dray
mdray@hunton.com

J.G. Ritter
jritter@hunton.com

Marc E. Purintun
mpurintun@hunton.com

*Alternate location for
L. Scott Austin:
Atlanta Office
600 Peachtree Street, NE
Suite 4100
Atlanta, Georgia 30308-2216

Health Care Reform — The Retiree Reinsurance Program

The Patient Protection and Affordable Care Act of 2010 (the "PPACA") provides for a temporary "early-retiree" reinsurance program. (See April 2010 client alert entitled "Health Care Reform — What Employers Need to Know Now" for a brief description.) On May 4, 2010, the Department of Health and Human Services ("HHS") announced that this program will go into effect as of June 1, 2010 and interim final regulations addressing the program were issued on May 5. HHS also announced at that time that it expects to be ready to accept program applications by the end of June. Because of the limited funding for this program, it will be important to promptly submit an application upon the opening of the program and thereafter quickly and accurately submit eligible claims (upon acceptance into the program) in order to obtain some reimbursement before the program closes.

Below is a brief description of some of the more important aspects of the basic requirements for this program set out in the regulations.

Program Overview

As mentioned in the April 2010 client alert, PPACA established a $5 billion reinsurance fund to reimburse employment-based plans for covered health expenses of retirees between the ages of 55 and 65 (and their dependents). According to a recent White House Fact Sheet, the aim of the program is to make it easier for employers to provide continued health care coverage to early retirees. Under the program, 80 percent of a covered retiree's or dependent's annual claims between $15,000 and $90,000 are eligible for reimbursement. PPACA requires that plan sponsors submit an application to HHS in order to participate in the program.

Program Participation

In keeping with PPACA, the HHS regulations provide that a plan sponsor must submit a separate application for each group health plan under which eligible early-retiree health care coverage is provided. HHS has announced that this application process will be similar to the one in place for the retiree drug subsidy. Although the final details have not yet been announced, this probably means that application will have to be made electronically (as is currently done for the drug subsidy).

To qualify, the plan must, among other things, have programs/procedures that have generated (or have the potential to generate) cost savings for "chronic and high cost conditions"

(generally, a condition producing $15,000 or more in annual claims). In addition, the plan sponsor must:

- have a written agreement with the plan (if the retiree program is self-insured) or the insurer (if it is insured) regarding the disclosure of plan/participant information to HHS to allow the agency to verify compliance; and
- ensure that adequate policies and procedures are in place to protect against fraud, waste and abuse under the program.

The regulations require only that the plan sponsor submit one application per plan. The application must, among other things:

1. set out the applicable plan year;
2. include certain information concerning the agreement with the plan or insurer on disclosure;
3. provide a summary of (i) the required cost-savings programs/procedures and (ii) how any reimbursements will be used (*see* discussion below on requirements in this regard);
4. identify all plan benefit option available to early retirees; and,
5. provide projected reimbursements for the first two plan years under the program (so that the agency can gauge the volume of claims to expect).

According to HHS, applications will be processed in the order in which they are received, and incomplete or rejected applications will go to the back of the line upon resubmission.

Reimbursable Claims

In general, any claims for medical, surgical, hospitalization, prescription drugs or similar benefits (basically, "major medical" items) are eligible for reimbursement. On the other hand, benefits that are exempted from HIPAA (such as long-term care) or are otherwise not typically included in a major medical plan are *not* covered.

The regulations provide that 80 percent of the *total* cost of health care benefits paid by the plan *and* the retiree (including copays and other out-of-pocket expenses) for claims incurred in any plan year between $15,000 (the "threshold") and $90,000 (the "limit") are reimbursable under the program. As mentioned above, the eligible expenses of a retiree's spouse and dependents are separately subject to reimbursement by treating each such person as a separate "retiree" for this purpose. Note, though, that *only* those expenses *paid by the plan* are ultimately reimbursable (and, therefore, the employer will not be reimbursed for retiree-paid amounts absent proof of payment by the plan).

As noted above, eligible expenses and reimbursements are to be determined on a plan year basis. While the program will go into effect on June 1 for eligible plans, expenses incurred *prior to* that date will (no matter what the plan year is) *not* be eligible for reimbursement. The regulations provide, though, that for a plan year that straddles June 1, 2010, (e.g., a calendar year plan year), any amounts incurred before June 1 will count toward the annual $15,000 claims threshold and $90,000 limit for each eligible retiree.

Submission of Claims

Under the regulations, individual claims cannot be submitted for reimbursement until an application for the plan (as described above) has been submitted to, and ultimately approved (i.e., certified) by, HHS. In addition, claims cannot be submitted for an eligible retiree until his or her annual claims reach the $15,000 threshold. Once the threshold is reached, however, sufficient evidence of all claims (including those below the threshold) must be submitted to HHS. Note, though, that only *paid* claims can be submitted under HHS rules. Thus, vendor price concessions and discounts must be subtracted from the claim amount.

Use of Reinsurance Proceeds

Under the new law, program reimbursements *cannot* be used for general corporate purposes. Instead, the proceeds may, per the regulations, be used only to reduce:

1. plan participant premiums, copayments, deductibles or other costs, and/or
2. employer premiums or costs.

Note that the first option is *not* limited to the costs of eligible retirees, but may be applied to the costs of any plan participant (including active employees). At the same time, to preclude employers from indirectly using program proceeds for corporate purposes, the regulations impose a "maintenance of benefits" rule for the second option. Under that rule, an employer may use the second option only to reduce *future increases* in employer costs or premiums.

Expected Duration of Program

In general, the program is a temporary one that is scheduled to end as of the earlier of 2014 or the date the $5 billion fund is exhausted. Given that not only are private employers eligible for this program but so are state and local governments and union-sponsored retiree health trusts (including the ones established in recent years for auto industry retirees), the general thinking is that the program's funding will not last long. In anticipation of this, the regulations give HHS wide discretion to close the program to additional applicants and limit/close the claims process at any time.

We welcome the opportunity to answer any questions you may have regarding the early-retiree reinsurance program described above or to assist you in evaluating or using the program.