

# ALSTON & BIRD



## HEALTH & WELFARE PLAN LUNCH GROUP

May 6, 2021

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## Health & Welfare Benefits

MONTHLY UPDATE

### Agenda






- Legislative Update
- ARP Subsidy Update
- Health Plan Litigation Developments
- ERISA Issues Related to Settlements, Refunds, and Recoveries

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## Legislative Update – Biden Economic Plan



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**American Rescue Plan**  
Enacted March 11, 2021

- **American Jobs Plan**
  - ~\$2.3 trillion in infrastructure spending – transportation, housing, climate, broadband, and more
  - ~ \$400 billion energy tax credits
  - Includes the **Made in America Tax Plan**
    - Significant business tax increases
    - Offsets AJP for 15 years
- **American Families Plan**
  - ~ \$1.8 trillion in human infrastructure - education, childcare, economic security
  - Federal paid family and medical leave program. When fully effective in 10 years, guarantees 12 weeks of paid leave, up to \$4K/month.
  - Makes permanent ACA premium tax credit expansion in ARP

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## Biden economic plan--What's next?






- Congressional input/reactions
- House and Senate working through their own processes to shape the package. Examples-
  - RX pricing - HR 3, Elijah E. Cummings Lower Drug Costs Now Act, introduced by Energy & Commerce Chair Frank Pallone (D-NJ)
  - Broader health care reform
  - WM Chair Richie Neal (D-MA) "Building an Economy for Families Act" includes universal paid family and medical leave, guaranteed access to childcare, and permanently extending certain worker and family related refundable tax credits from ARP
  - Senate Finance Chair Ron Wyden (D-OR) has his own international tax proposal and a mark to market proposal for high income taxpayers
- Slim Democratic majorities, particularly in the Senate, mean compromise among Democrats is needed
- Process
- Timing

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## American Rescue Plan: COBRA SUBSIDY DEEPER DIVE

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### American Rescue Plan – COBRA Subsidy

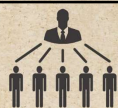
- 100% subsidy for coverage from April 1 through Sept. 30, 2021.
  - Does not extend normal COBRA coverage period.
- Triggering event is loss of coverage due to involuntary termination of employment or a reduction in hours.
  - Applies to all qualified beneficiaries who lose coverage (e.g., spouse and dependents).
- Very similar (but not identical) to the American Recovery and Reinvestment Act of 2009 (*ARRA*).

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### American Rescue Plan – COBRA Subsidy

- Subsidy not available if individual is (or becomes) *eligible* under another group health plan (e.g., spouse’s plan) or Medicare.
  - Eligibility for excepted benefits (stand alone dental and vision), Health FSA or QSEHRA will not disqualify an individual from a subsidy.
  - Qualified beneficiary must provide notice if no longer eligible or face a \$250 penalty.
    - Higher penalty if the failure to notify is fraudulent.
- What if eligible but no current enrollment right (e.g., cannot come on to spouse’s plan mid-year).
  - Under ARRA considered subsidy-eligible until “the first date that coverage can take effect”.
  - DOL model forms indicate “eligibility for coverage does not include any time spent in a waiting period.”

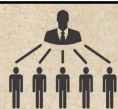
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### American Rescue Plan – COBRA Subsidy

- On April 7, 2021 DOL issued the following guidance:
- [FAQs about the subsidies;](#)
- [A summary of subsidies;](#)
- [A model general notice and election notice;](#)
- [A model notice in connection with the extended election period;](#)
- [A model alternative notice; and](#)
- [A model notice of expiration of subsidies.](#)

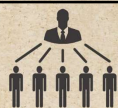
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### American Rescue Plan – COBRA Subsidy

- Which plans are covered?
  - All COBRA covered plans except for Health FSAs ( Confirmed in ARP FAQ 2).
    - Would include dental and vision.
    - HRAs and ICHRAs.
    - Certain EAPs and wellness programs.
    - Most onsite clinics.
  - State and local governmental plans under the PHSA’s COBRA provisions.
- Also covers “a State program that provides comparable continuation coverage” (e.g. mini-COBRA laws).

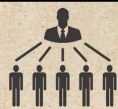
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### AMERICAN RESCUE PLAN--COBRA Subsidy

- Assistance Eligible Individuals (AEIs) are those whose involuntary termination of employment or reduction in hours occurred:
  - During the subsidy period.
  - Prior to the subsidy period but they have existing COBRA coverage extending into the subsidy period.
  - Prior to the subsidy period and have not elected COBRA. But if they had elected, coverage would have extended into the subsidy period (the second bite at the apple).
    - Includes those who elected and subsequently dropped COBRA coverage before the subsidy period begins.

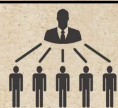
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### American Rescue Plan--COBRA Subsidy

- To receive the subsidy the COBRA event must be a reduction in hours or involuntary termination of employment.
  - COBRA administrators will need information on involuntary terminations since they likely do not have it.
  - Gross misconduct exception still applies but, as always, use with caution.
  - Reduction in hours can be voluntary or involuntary (but must cause a loss of coverage).
    - ARP FAQ 3—"lawful strike" can result in a reduction in hours and subsidy "as long as the individual remains an employee."
- Very similar procedurally to the *ARRA* subsidy back in 2009.
  - IRS FAQs on *ARRA* subsidy (Notice 2009-27) contain a number of FAQs around involuntary termination of employment.
  - Other *ARRA* guidance can be found here: <https://www.irs.gov/newsroom/cobra-health-insurance-continuation-premium-subsidy>
  - Expect similar ARP IRS FAQs soon (this week?)

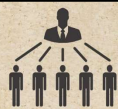
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### American Rescue Plan--COBRA Subsidy

- What is an involuntary termination of employment?
  - Slightly different language in *ARRA* and ARP (involuntary in *ARRA* "except for voluntary" in ARP).
    - Is there a difference? DOL ARP FAQs also use the term "involuntary termination".
  - *ARRA* Definition from 2009-27:
    - "[T]he independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee's implicit or explicit request."
    - Good reason resignation due to employer action that causes a material negative change in the employment relationship for the employee is an involuntary termination.
      - Facts and circumstances test.
    - Buyout package accepted by the employee is an involuntary termination.
- What about an employee who does not return to work because of worries of COVID exposure or continued childcare issues because of COVID?

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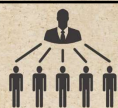
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### American Rescue Plan--COBRA Subsidy

- AEs include the qualified beneficiaries associated with the employee.
- *ARRA* FAQs had guidance on some issues that may arise with family members and was generally restrictive on:
  - Second qualifying event.
  - Adding family members during plan open enrollment.
- *ARRA* FAQs indicated each qualified beneficiary had an independent election right.
  - Employee involuntarily terminated while on family coverage but elects self-only COBRA.
    - Family member qualified beneficiaries will have an individual election right to the subsidy.
  - Same treatment under ARP confirmed in FAQ 16.

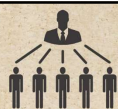
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### American Rescue Plan--COBRA Subsidy

- Extended Election Notice to AEs must go out within 60 days from April 1<sup>st</sup> (May 31<sup>st</sup> ).
  - DOL issued a model notice on April 7<sup>th</sup>.
  - DOL confirms in ARP FAQ 6 that the extended election period does not apply to state continuation coverage (mini-COBRA).
  - Extended Election Notice also should be used for those already on COBRA.
    - Should the notice be modified for those already on COBRA to delete repeated references to electing COBRA?
  - Model "Summary of the COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021" (Subsidy Summary) should be included with Extended Election Notice.






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### American Rescue Plan--COBRA Subsidy






- General Notice/Election Notice must be modified or supplemented for those with qualifying events between April 1, 2021 and September 30, 2021.
  - Most likely to use supplement since subsidy is temporary.
  - Must go to **all** qualified beneficiaries who have qualifying events during this period.
  - DOL issued a model on April 7<sup>th</sup>.
  - Subsidy Summary should be included with the General Notice/Election Notice or any supplement.

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### American Rescue Plan--COBRA Subsidy






- DOL has provided an “Alternative Notice” that can be used for those under state continuation (mini-COBRA) provisions.
  - Appears that in most instances insurer (“issuer”) will have the notification responsibility under mini-COBRA.
    - Mostly applicable to fully insured small employer plans (under 20 employees) not subject to COBRA but could be applicable to fully insured church plans of any size.
    - While extended election period does not apply to mini-COBRA, will states enact corresponding extended election period?
    - Subsidy Summary should be included with the Alternative Notice.

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### American Rescue Plan--COBRA Subsidy






- Do state mini-COBRA laws apply to any self-insured plans?
  - Laws will need to be examined carefully.
  - Self-insured church plans? *If* covered under mini-COBRA.
    - Who has the notice responsibility (church will receive the tax credit)?
  - Level funded small employer plans not subject to COBRA.
    - Covered under mini-COBRA?
      - ERISA preemption of state mini-COBRA law if covered?
- What about mini-COBRA laws that provide continuation coverage for longer than 18 months for an involuntary termination of employment or reduction in hours?

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### American Rescue Plan--COBRA Subsidy






- AEIs have 60 days to elect coverage after receipt of the Extended Election Notice with the subsidy back to April 1<sup>st</sup> .
  - Because of Outbreak Period many AEIs will have the option to elect COBRA *without* the subsidy back to the qualifying event and with the subsidy beginning April 1st. (ARP FAQs 10 and 13).
  - ARP FAQs 5 and 13 confirm that the Outbreak Period does not apply to the specific ARP time periods (e.g. the 60 days to elect the subsidy).

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**American Rescue Plan--COBRA Subsidy**






- Notice on the expiration of the subsidy and the right to continue COBRA paying the full premium is also required.
  - Notice must go out in the period beginning 45 days before the subsidy ends and ending 15 days before the subsidy ends.
    - September 15<sup>th</sup> deadline for those whose subsidy expires September 30<sup>th</sup>.
  - DOL issued model on April 7th.
  - Impossible to meet the deadline for those whose maximum COBRA period expires in April or May.

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**American Rescue Plan--COBRA Subsidy**

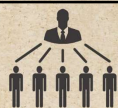
- Can AEIs currently on COBRA be auto-enrolled in subsidy?
  - ARRA FAQs provided that enrollment in subsidy required notice because of the issue around other disqualifying coverage.
  - ARP FAQs mention required “elections.”
  - ARP model forms contemplate election.
  - Subsidy Summary contains a form to “apply” for a subsidy (Request for Treatment as an Assistance Eligible Individual).

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### American Rescue Plan--COBRA Subsidy

- Will there be a special enrollment right to Marketplace coverage after the end of the subsidy?
  - ARP FAQ 21 appears to confirm that special enrollment will be available.
- Employer may allow (permissive) AEIs to change plan options provided the premium for the option is less than current premium and certain other conditions are met.
  - Cannot be excepted benefits (e.g., standalone dental or vision or a Health FSA).
  - Why would an AEI change to a lower cost option? Possibly because AEI wants to continue with COBRA coverage after subsidy period ends.
- Expedited review with DOL of disputes concerning the subsidy (15 business days).

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### American Rescue Plan--COBRA Subsidy

- Employer is responsible for the subsidy and takes a tax credit against Medicare payroll tax.
- Employer takes the tax credit for ***plans covered by federal COBRA whether fully insured or self-funded.***
  - Except for multiemployer plans (collectively bargained) where the plan takes the credit.
  - Mechanics with COBRA administrator likely to vary whether fully insured or self-funded.
- Insurer takes the tax credit in only very limited circumstances.
  - Fully insured and under the small employer exception to COBRA (under 20 employees) and covered by a state mini-COBRA law.
  - Fully insured and a church plan and covered by a state mini-COBRA law.






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### American Rescue Plan--COBRA Subsidy

- Unclear as to who takes the credit for a multiple employer welfare association (MEWA).
  - Under *ARRA* it was the participating employer.
- Guidance will be issued with respect to PEOs.






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### American Rescue Plan--COBRA Subsidy

- Credit to be taken on quarterly Form 941s
  - Credit is fully refundable. If credit exceeds the Medicare payroll tax, then employer receives a tax refund.
- Advance payment of the refundable credit may be claimed using Form 7200 (Advance Payment of Employer Credits Due to COVID-19)
  - IRS Notice 2021-24 confirmed advance payment on Form 7200 and provided certain penalty relief <https://www.irs.gov/pub/irs-drop/n-21-24.pdf>
  - Revisions to Form 7200 to accommodate this credit current in draft form. <https://www.irs.gov/pub/irs-dft/f7200--dft.pdf>
- If AEI erroneously pays the premium it must be refunded within 60 days of payment (or a credit against future payments).

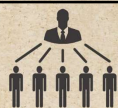
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### American Rescue Plan--COBRA Subsidy

- What did we learn from the DOL FAQs and model notices?
  - FAQs largely directed at AEIs and not employers or COBRA administrators.
  - Confirmation that the Outbreak Period does not apply to the ARP 60-day extended election period or other ARP time periods.
  - Confirmation that election of subsidized coverage from April 1<sup>st</sup> does not cut off an AEI's right to retroactive unsubsidized coverage under the Outbreak Period.
  - Confirmation that the special 60-day extended election period does not apply to mini-COBRA.

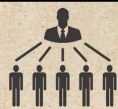
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### Points to Ponder

- Coordination between COBRA administrators and employers.
  - Who does what?
  - Issues regarding costs associated with mailing the two notices.
  - Preparation and timely delivery of notices.
  - Difficult issues for AHPs /MEWAs and PEOs.
- Employer identification involuntary terminations and reductions in hours going back to October 2019.
  - Likely will not know all nuances of involuntary terminations until further guidance.
- Employers will need to review any severance agreements or severance plans that provide for subsidized COBRA.
- Employers will need to alert payroll departments to possible changes to remitting payroll taxes (Form 941).
  - Will Form 7200 be used for advance payment of the credit?
- Can any communication be coordinated with the now phased end to the Outbreak Period?

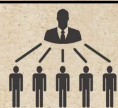
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### Health Plan Litigation Developments

#### *Breach of Fiduciary MHPAEA Litigation Against TPA/Claims Administrator*

- Employer sponsored self-funded health plan covered Autism but excluded coverage for “intensive behavioral therapies such as applied behavior analysis for autism.”
- Claims administrator denied expense requests because of the express plan exclusion in both 2016 and 2019.
- Plaintiff alleged that Claims Admin breached its fiduciary duty under ERISA by refusing to cover ABA under a specific plan exclusion that violated MHPAEA.
- Claims Administrator defended that:
  - 1) it was not a fiduciary given that it was not exercising a discretionary action by enforcing the exclusion (in applying plain language of the ABA/IBT exclusion); and,
  - 2) the exclusion was not a “treatment limitation” under MHPAEA.

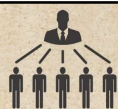
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### Health Plan Litigation Developments

#### *Was Claims Administrator a Fiduciary?*

- Due to the myriad of cases generally holding that a benefit determination under ERISA was fiduciary in nature, Claim Admin was found to be a functional fiduciary because it was given authority to make benefits determinations and it rejected the beneficiary’s coverage for expenses.
- Fact that Claim Admin argued being unable to rewrite the plan found irrelevant because *plan terms cannot override fiduciary duties*.

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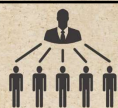
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### Health Plan Litigation Developments

*Did ABA exclusion violate MHPAEA?*

- Court held that the ABA/IBT exclusion violated both the Parity Act's prohibition against:
  - treatment limitations being more restrictively applicable to MH/SUD benefits than as applied to substantially all MED/SURG benefits covered; and,
  - having separate treatment limitations applicable only with regard to MH/SUD benefits.
- Rationale:
  - the ABA/IBT exclusion, by only being applicable to services for a mental health condition (Autism), facially violated the Parity Act.
  - the exclusion also violated the Parity Act by carving out a core Autism treatment from coverage: ABA Therapy, because there were no comparable exclusions from coverage under the plan for MED/SURG primary treatment modalities.
- Once the plan sponsor chooses to cover Autism, any limitation on such services must be applied with parity to MED/SURG benefit coverage.

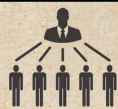
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### Health Plan Litigation Developments

*So what?*

- Plan Sponsors need to ensure MHPAEA required comparative analysis is completed, and that the analysis is completed correctly.
- When comparative analysis information has been requested in the past, we have only been provided with a high-level analysis
- Deep dive on MHPAEA Comparative Analysis in June

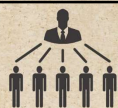
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## Health & Welfare Benefits

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# Health Plan Litigation Developments

## *Data Marketing Partnership v. DOL*

- Partnership offers limited partner interests to individuals that sign a Joinder agreement, download tracking software onto their computer/phone, log at least 500 hours on their computer while using said software, and agree to furnish their data for the purpose of data marketing.
- Court found plan to be governed by Title I of ERISA.
- Also, because such individuals become a “working owner” and a bona fide partner, they may participate in a single employer self-insured welfare benefit plan set up by partnership, as long as partnership covers at least one common law employee.
- Partnership's partner company, LP Management Services LLC, asked DOL for a determination that its health plan was governed by ERISA in November 2018. DOL responded in January 2020, saying the company's limited partners aren't technically “employees” and therefore can't be considered participants in a single-employer health plan.

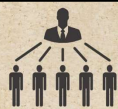
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# Health Plan Litigation Developments

## *Data Marketing Partnership v. DOL*

- In September 2020, a Texas federal judge ruled that the health plan provided by Partnership offering health care in exchange for tracking and selling its participants' electronic data was covered by ERISA—ultimately setting aside DOL's advisory opinion and enjoining DOL from refusing to acknowledge that the limited partners were plan participants.
- Texas court also ruled that the plan was not a multiple employer welfare association (MEWA) .
- Self-insured single employer health plans are generally not subject to state regulation because of ERISA preemption.
- That decision is now in front of the fifth circuit court of appeals. NAIC and the Blues Association have each filed amicus urging the 5<sup>th</sup> to reverse.
- If decision allowed to stand, it would create an enormous “loophole” for possibility of very sketchy arrangements

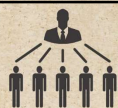
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### ERISA Fiduciary Considerations - Settlements, Insurer Refunds, Subrogation Recoveries

- We will examine the following proceeds paid to ERISA covered plans:
  - Litigation/class action settlements
  - Subrogation recoveries
  - Premium refunds from health and welfare insurers
- If these proceeds are composed, in whole or in part, of ERISA plan assets, they must be handled in accordance with ERISA's general fiduciary standards.

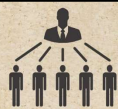
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### Do the Proceeds Contain ERISA Plan Assets?

- For insured benefits, if the policy is in the name of the plan or the plan's trust, then the proceeds are plan assets in the absence of plan language to the contrary.
- If the policy is in the name of the employer or for self-funded benefits funded without a trust, then the employer may be able to keep some of the proceeds depending on the policy and/or plan language.
- If the plan language is silent, then the DOL looks to the relative portion of the premium paid by employees and the employer during the period that gave rise to the award of proceeds.

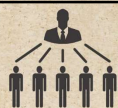
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### Plan Asset Guidelines

IF	THEN
The plan or plan trust is the policyholder	The entire proceeds are plan assets
The employer pays the entire premium	No part of the proceeds is a plan asset; the employer is entitled to the entire proceeds.
The participants pay the entire premium	The entire proceeds are plan assets
The participants and employer each pay a fixed percentage of the premium/contribution	The percentage of the proceeds equal to the percentage of the premium paid by participants are plan assets
The employer pays a fixed amount and participants pay the rest	The proceeds are plan assets, except to the extent the proceeds exceed the total amount paid by participants
Participants pay a fixed amount and the employer pays the rest	The proceeds belongs to the employer, except to the extent the proceeds exceed the total amount paid by the employer

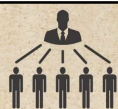
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### General ERISA Fiduciary Standards

- For settlements with parties-in-interest, plan fiduciaries should structure the settlement to meet the requirements in PTE 2003-39.
  - Definition of “parties-in-interest” under ERISA is broad, includes fiduciaries, plan service providers, and an employer with employees covered under the plan.
- Decisions on whether to accept a litigation settlement include consideration of the plan’s likelihood of full recovery, risks and costs of litigation, and value of claims forgone.
- Litigation advice on settlement proceeds in the retirement context was provided in DOL Field Assistance Bulletin No. 2006-01.
  - In deciding on an allocation method, the plan fiduciary may properly weigh the competing interests of various participants or classes of plan participants (*e.g.*, affected versus current participants) and the effects of the allocation method on those participants provided a rational basis exists for the selected method and such method is reasonable, fair and objective.

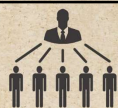
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### DOL Tech. Rel. 2011-04

- Most recent guidance is DOL Technical Release (TR) 2011-04 on MLR rebates, which restates general guidance on ERISA fiduciary principles.
- The plan fiduciary determines the allocation method among plan participants and the particular use of the MLR rebates, *e.g.*, to reduce premiums, make cash distributions, or for other permitted plan purposes, in accordance with ERISA's general prudence standard.
- The plan fiduciary should consider and document the relative costs and benefits of different approaches.
- If there is already a trust for the plan, then the plan assets must be placed in a trust.
- If there is not a trust, then TR 2011-04 does not require the assets be placed in trust if the cafeteria plan safe harbor applies under TR 92-01.

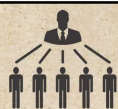
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### How to Allocate the Plan Assets

- Based on the TR 2011-04, as well as prior guidance, the following general principles apply:
  - No requirement to allocate precisely among plan participants based upon their premium payments.
  - Allocation method must be reasonable, fair, objective, and cannot benefit a plan fiduciary who is also a plan participant at the expense of other participants.
  - May be allocated to only current plan participants if the cost of allocating a portion of the proceeds to former plan participants is unreasonable.
  - General rule is to allocate the proceeds among the participants covered by the policy to which the refund relates.
    - Not required if the fiduciary determines under the circumstances that it is not prudent or in the best interests of plan participants.
    - It may be prudent in some circumstances to allocate the proceeds for all participants in a plan, not just those in the option that generated the proceeds.

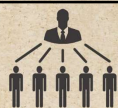
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### How to Use the Plan Assets

- TR 2011-04 does not contain specific rules or safe harbors regarding permitted uses.
- Proceeds may be distributed in cash, used to reduce future premiums, enhance benefits, or for any other permissible plan purposes consistent with ERISA fiduciary requirements.
  - Some litigation or class action settlements may limit how the proceeds are used.
- The amount of the refund will be a significant factor in determining an appropriate use.
  - Administrative costs of reducing future premiums or distributing cash refunds are likely to be prohibitive and other uses may be permissible.
  - May be appropriate to enhance benefits or offer a wellness benefit.
- Cannot use proceeds from one plan for the benefit of participants in another plan.

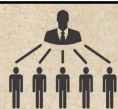
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### Tax Considerations from IRS FAQs for MLR Rebates


IF	THEN
Employee portion of premium is pre-tax	<ul style="list-style-type: none"> <li>• Any cash refund is taxable</li> <li>• If there is a reduction in premium cost (<i>i.e.</i> premium holiday) the increased portion in salary is taxable</li> </ul>
Employee portion of the premium is after-tax	<ul style="list-style-type: none"> <li>• Any cash refund or reduction in premium cost generally is not subject to tax, exceptions include where an employee has previously deducted the premium on his or her federal income tax return</li> </ul>

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# Thanks!

- Questions?

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