



care benefits under the TRICARE program. It is not limited to active employees; rather, it includes retirees to the extent eligible for the TRICARE program.

While enacting a broad TRICARE secondary rule, Congress also recognized that the benefits of Code § 125 (relating to so-called “cafeteria plans”) should be preserved. The final regulation clarifies the application of the cafeteria plan rules to TRICARE supplemental policies in a manner that follows the intent of Congress. In so doing, it provides employers with a measure of comfort missing from the proposed regulation. Specifically, the proposed regulation was unclear about the relationship between the TRICARE secondary payer rules and the cafeteria plan rules in two important respects: first with respect to whether TRICARE supplemental policies could be offered as “voluntary” benefits; and second with respect to cafeteria plan “opt-out” arrangements.

(1) *Voluntary benefit programs*

As the name suggests, “voluntary benefit programs” are arrangements under which employees are furnished access to supplemental benefits, which are entirely employee-paid. These programs are offered principally for the convenience of employees, and the employer’s role is generally limited to handling the payroll deductions and forwarding payments to the vendor or carrier. Employers incur no direct costs. Voluntary benefit programs typically include some or all of the following insured benefit options:

(a) *Disability.* Voluntary disability insurance usually provides benefits over and above basic disability insurance, offering income protection in the form of benefits that partially replace income lost as a result of a disabling non-occupational accident or illness.

(b) *Life.* Voluntary life insurance plans provide access to life insurance at rates that reflect group economies of scale.

(c) *Health.* Voluntary health insurance serves as supplemental insurance to an individual’s existing health insurance plan. Benefits include costs of outpatient or inpatient treatment, and they are designed to help offset the loss of income.

(d) *Accident.* Voluntary accident insurance provides supplemental on- or off-the-job coverage and may cover deductibles and other services standard health care coverage may not provide.

(e) *Specified Disease/Cancer.* Voluntary benefits can target specific conditions or diseases, e.g., cancer. They are intended to assist individuals to maintain adequate earnings for everyday living expenses.

(2) *Cafeteria plan “opt-out” arrangements*

A cafeteria plan opt-out arrangement is a program under which an employer offers its employees a cash payment or some other consideration in return for declining to participate in the employer’s group health plan. Though not required, in most instances the employee must also be able to demonstrate that he/she has obtained coverage from another source.

**Example:** Employer X offers both individual and family group health coverage to its full-time employees. In an effort to reduce health plan costs, Employer X adopts a cafeteria plan opt-out arrangement under which an employee who can demonstrate that he or she has other group health coverage is paid \$800 for each year in which he or she accepts the other coverage and declines coverage under the employer’s group health plan.

Because opt-out arrangement offers a choice between cash and a non-taxable benefit, the value of the non-taxable benefit (in this case, group health insurance) is nevertheless taxable *unless* offered under a cafeteria plan.

The principle benefit of a cafeteria plan opt-out arrangement is a substantial savings in health care costs for the employer from three sources:

(a) The cost of a typical opt-out payment is a fraction of the employer’s portion of health care premiums. Where opt-out payments are on the order of hundreds of dollars, the employer’s annual premium contribution is typically in the thousands of dollars.

(b) For larger, experience-rated or self-funded plans, the savings can be significant, particularly where older employees choose to decline coverage and accept the opt-out payment.

(c) When an employee chooses the opt-out payment and declines employer-sponsored group health plan coverage, there is no risk of adverse benefit claims to the employer.

**The Final TRICARE Secondary Payer Regulation**

The final Department of Defense rule issued April 9, 2010 adds to § 199.8 of the TRICARE Regulation a new paragraph (d)(6) concerning the statutory prohibition against financial and other incentives not to enroll in a group health plan. The final regulation expressly allows and provides clear rules for implementing voluntary benefit programs involving TRICARE supplemental insurance coverage and cafeteria plan opt-out arrangements that cover TRICARE-eligible individuals.

(1) *TRICARE supplement as a voluntary benefit*

The final regulation expressly recognizes that TRICARE-eligible employees may be offered a TRICARE supplemental benefit as a voluntary benefit on a pre-tax basis under a Section 125 cafeteria plan, provided that the employer does not provide any payment for the benefit or receive any direct or indirect consideration or compensation for offering the benefit. This change means that employers are expressly permitted to add TRICARE supplemental insurance coverage to their menu of voluntary benefits or even offer coverage as a stand-alone voluntary benefit. (Under the proposed regulations, it was not clear that employer could do this without risking a violation of the TRICARE secondary payer rules.) The employer's involvement must be limited to providing the administrative support for the voluntary benefits. There is, in addition, a documentation requirement, under which the employer must certify compliance to the Department of Defense.

(2) *Broad-based cafeteria plan opt-out provisions*

Where a benefit is offered under a section 125 cafeteria plan to all similarly situated employees, including non-TRICARE-eligible employees, there is no violation of the TRICARE secondary payer rules. ("Similarly situated" for this purpose means and refers to bona fide employment classification such as part-time vs. full-time. It does not mean TRICARE-eligible vs. non-TRICARE eligible.) This means that "opt-out" programs under which an employer makes available a cash payment where an employee declines coverage in the employer's plan because he or she has other coverage—TRICARE included—are expressly allowed.

**Conclusion**

Even before the issuance of the final regulation, we were confident based on existing tenants of tax and benefits law that voluntary benefit programs and cafeteria plan opt-out provisions were entirely consistent with the TRICARE secondary payer rules. But under the proposed regulation, it was not clear that the regulators would approve these approaches. The final regulation removes any doubt: cafeteria plan opt-out arrangements and voluntary benefit programs now enjoy official sanction. As a consequence, employers can make TRICARE supplements available under these sorts of programs without fear of violating the TRICARE secondary payer rules and incurring the accompanying penalties.

I hope this helps you to understand these changes to the TRICARE secondary payer rules and how they might benefit your clients. Please call or contact me if you have any further questions or concerns about their content or application.