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The Department of Defense has issued proposed regulations prohibiting an employer from offering financial or benefit incentives to discourage TRICARE beneficiaries from enrolling in group health plans.

## Employee Benefits

A Littler Mendelson Newsletter

### Proposed Rule Clarifies Prohibition on Employer Incentives to TRICARE Beneficiaries

By *Russell D. Chapman*

As expected, the Department of Defense (DoD) has issued proposed regulations regarding the coordination of employer-provided group health care and TRICARE. TRICARE is a U.S. Government-sponsored group health program providing benefits to retired military personnel and their dependents. In general, the proposed rule seeks to clarify an earlier TRICARE amendment that prohibits an employer from offering financial or other benefits to TRICARE beneficiaries as incentives not to enroll or to terminate enrollment in a group health plan that would be primary to TRICARE. The proposed rule's retroactive effective date is January 1, 2008.

The proposed TRICARE regulations specifically seek to prevent employers from shifting the group health care costs of TRICARE beneficiaries to the DoD. The preamble to the regulations cites the rising trend of employers (including state and local government employers) offering supplemental TRICARE insurance as an incentive to discourage employees from enrolling in the employer's primary group health plan. The DoD asserts that such incentives are shifting thousands of dollars of annual health care costs to the DoD, draining resources from higher national security priorities.

The proposed regulations provide the following rules:

- A prohibition on employers offering financial or other incentives to a TRICARE beneficiary to not enroll in the employer's group health ben-

efit plan. A breach of this rule would subject the employer to a civil penalty not to exceed \$5,000 for each violation.

- Two exceptions to this prohibition would include situations where: (1) the beneficiary has primary coverage other than TRICARE; and (2) the benefit is a qualified Internal Revenue Code Section 125 Cafeteria Plan that is offered to all employees and is not a TRICARE-exclusive plan.
- When coordinating employer-provided benefits and TRICARE benefits for a beneficiary with dual coverage, the employer plan will always be the primary payer, ensuring that TRICARE is always secondary.
- TRICARE supplemental insurance plans may not be offered to TRICARE beneficiaries as an option for group health coverage under an employer-sponsored plan. However, the proposed rule does not extend this prohibition to TRICARE supplemental plans that are offered by an insurer or beneficiary association rather than an employer. For these plans, TRICARE will remain the primary payer with the supplemental plan paying second.

The proposed TRICARE regulations do not prohibit an employer from providing an incentive to employees to not enroll in the employer's group health plan, so long as that incentive is avail-

able to all eligible employees and is not specifically focused on TRICARE. For example, an employer may offer a cash incentive of \$500 to any eligible employee who does not enroll in the employer's group health plan. The incentive would be paid whether the employee enrolled as a dependent in the group health plan of a spouse, in a governmental plan, in a private health plan, and even if the employee forgoes coverage altogether. Such a neutral incentive would not violate the TRICARE incentive prohibition because it is not directed solely at TRICARE beneficiaries.

The prohibition on employer incentives is modeled after the Medicare as Secondary Payer (MSP) rules, which prohibit employers from offering incentives to Medicare-eligible individuals in exchange for not enrolling in the employer's group health benefit plan. However, employers should be cautioned that there is no evidence that the DoD intends the TRICARE coordination rules to run parallel to the MSP rules in all respects (e.g., there is no small employer exception for TRICARE, although such an exception exists for Medicare).

For now, employers who offer group health benefits to TRICARE beneficiaries should review their current group health and Section 125 cafeteria plan designs to determine whether they conform to the proposed TRICARE regulations. Employers who offer the prohibited incentives intended to discourage TRICARE beneficiaries from enrolling in the employer's health benefit plans or who offer TRICARE supplemental plans as an alternative to the primary group health plan should contact legal counsel as soon as possible for guidance on how and when to comply with the proposed TRICARE regulations.

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*Russell D. Chapman is Of Counsel in Littler Mendelson's Dallas office. Andrea Jackson, Senior Consultant, Employee Benefits and Legal Compliance, in Littler Mendelson's Dallas office, co-authored this article. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Chapman at rchapman@littler.com, or Ms. Jackson at ajackson@littler.com.*

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