



Legal Alert: CMS Issues Unreasonable Rate Increase Final Rule

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Executive Summary: The recently published Rate Increase Disclosure and Review Final Rule, which takes effect July 18, 2011, provides that certain health insurance issuers with a rate increase filed in a state or becoming effective on or after September 1, 2011, will be subject to review for reasonableness if the rate increase is 10% or more. This could create problems for employers with fully-insured health plans utilizing a small group policy.

Details of Final Rule

The Affordable Care Act requires the Department of Health and Human Services in conjunction with states to establish an annual review process for unreasonable rate increases in health insurance coverage. The Center for Consumer Information and Insurance Oversight and the Centers for Medicare and Medicaid Services (CMS) published the rate increase disclosure and review final rule on May 23, 2011, which will become effective on July 18, 2011.

Under the Rate Increase Disclosure and Review Final Rule ("Rate Review Rule"), health insurance issuers offering health insurance in the small group or individual market whose rate increase meets or exceeds certain thresholds must disclose certain information to allow the state or CMS to determine if the rate increase is reasonable. The Rate Review Rule only applies to health insurers (i.e., insurance companies) issuing individual or small group policies. *Small group* is defined in accordance with the applicable state's insurance laws, or in the absence of a definition under the state's insurance laws, *small group* is defined as employers with 50 or fewer employees. The Rate Review Rule also does not apply to grandfathered health policies or policies providing only excepted benefits (i.e., limited scope dental and vision benefits, etc.).

The Rate Review Rule states that any product (i.e., package of health insurance benefits with its own set of rating and pricing methodologies a health insurer offers in a state) with a rate increase filed in a state or becoming effective on or after September 1, 2011, will be subject to review for reasonableness if the rate increase is 10% or more, or the rate increase meets or exceeds the applicable state-specific threshold. CMS will provide notice no later than June 1 of each year, indicating for each state whether the 10% threshold or the state-specific threshold will apply. For the 12-month period beginning September 1, 2011, the 10% threshold will apply in all states.

The rate increase meeting or exceeding the threshold will be reviewed by CMS only in the absence of an "Effective Rate Review Program" in the state in which the product is offered. Even if there is an Effective Rate Review Program in the state, a preliminary justification of the rate increase must be submitted to CMS and the state prior to implementing the rate increase or, if applicable, on the date the proposed rate increase is required to be submitted to the state for review. Information submitted as part of the preliminary justification will be posted on the CMS website except portions that contain trade secret or confidential information. A rate increase will be considered unreasonable under a CMS review or state review if it is excessive, unjustified, or unfairly discriminatory. In the case of a state review, a rate increase is also unreasonable if it is otherwise unreasonable as determined by the state. If a state reviews the rate increase, CMS will accept the state's final review determination. Final determinations made by CMS or by the state will be posted on the CMS website. Timeliness of a state's review presumably will be governed by state law. The Rate Review Rule states that CMS must complete its review in a timely manner. However, no guidance is provided to clarify what will be considered a timely review.

If an insurer decides to implement a rate increase which has been determined to be unreasonable, the insurer must provide a final justification to CMS responding to the final determination from CMS or the state. This final justification must be posted on the insurer's website and the CMS website for a minimum of three years. Although some states have authority to deny rate increases, CMS does not. However, CMS may provide supplemental performance grant funding to states with such rate denial authority or to states which seek such authority. Recipients of such grants must make recommendations to the state's Health Exchange regarding whether or not to exclude a health insurer based on a practice of unreasonable rate increases. The Exchange must consider such recommendations, but is not required to follow them.

Employers' Bottom Line

Employers with small fully-insured health plans may be impacted by the Rate Review Rule if their policy is from a product under CMS or state review for rate increase reasonableness. It is unclear how long the review will take or even if the insurer will modify the rate increase if it is found to be unreasonable. In a state without the authority to deny the rate increase, this may cause some difficulties for the employer. An employer in such a state may need to determine whether to switch policies and/or carriers because of the unreasonable rate increase or implement the policy with the unreasonable rate increase with the hope of a possible refund if the rate increase is lowered at a later time. Employers with small fully-insured health plans should monitor the CMS website for information on health insurance coverage products with possible unreasonable rate increases.

If you have any questions regarding this Legal Alert or need assistance with any of the Health Care Reform law changes, please contact Daniel T. Sulton at 864-699-1157 or dsulton@fordharrison.com or any member of Ford & Harrison's Employee Benefits Group. Additional information regarding Health Care Reform may be found on the Ford & Harrison LLP website at www.fordharrison.com.