

# Update

May 7, 2008



## Proposed TRICARE rules restrict employer health plan offerings

### Summary

Three months after a new law took effect that prohibits offering TRICARE-eligible employees incentives to drop or not enroll in an employer-sponsored health plan, the US Department of Defense (DOD) has proposed rules to implement the law. While the proposal confirms an earlier DOD [report](#) on what this ban means for employers in general and cafeteria plans in particular, a number of details remain uncertain. This *Update* gives background on the ban, summarizes points covered in the proposed rules and discusses implications for employers.

### Background on TRICARE and the ban

Like most employer health plans, TRICARE – the federal health benefit program for active and retired service members and their families – has experienced skyrocketing costs in recent years, but its efforts to increase beneficiaries' cost sharing have met resistance from lawmakers. At the same time, employers have begun offering employees incentives to drop employer coverage, thus shifting health care expenses to other payers – including TRICARE, which is the secondary payer of medical claims whenever beneficiaries have employer coverage. In response, Congress recently passed a [law](#) that aims to have employers pay a greater share of the tab.

**What does the law say?** The provision, which took effect Jan. 1, 2008, bans financial or other incentives that would encourage TRICARE-eligible employees to drop or not enroll in an employer-sponsored group health plan. This restriction essentially matches one under the Medicare program (see [Update: Employer plans and Medicare: Who pays first and when?](#)). In addition, the law requires TRICARE-eligible employees to have the same opportunity as other employees to participate in an employer-sponsored group health plan.

**Which employers are covered?** Every employer – including self-insured ones – with 20 or more employees is covered by the ban. Employers that fail to comply with the law face civil penalties of up to \$5,000 per violation.

## Costs, savings of ban on opt-out incentives

According to a Congressional Budget Office (CBO) [report](#), employers' efforts to shift health care costs by using opt-out incentives, like cash awards or subsidized TRICARE supplemental insurance, have paid off:

- Around 50,000 people have waived employer coverage in favor of TRICARE.
- Employers have saved up to \$132 million per year.

CBO estimates that the ban on opt-out incentives will save TRICARE:

- \$119 million in 2008
- \$700 million by 2011

## What DOD's proposed rules do and don't clarify

As discussed below, the DOD proposed rules clarify a number of practical questions concerning how this new ban affects employer-sponsored group health plans. But the proposal doesn't clearly address certain approaches to helping employees obtain third-party TRICARE supplemental insurance, and additional government guidance in this regard would be helpful.

### **No TRICARE supplemental insurance offerings from employers.**

Employers no longer can offer or subsidize insurance policies designed exclusively to supplement TRICARE benefits, even under cafeteria plans. Because only TRICARE-eligible employees considering waiving employer coverage would find these policies attractive, they are a type of opt-out incentive prohibited by the new law.

**Permitted types of arrangements.** Though employers cannot offer supplemental TRICARE insurance, the following arrangements are acceptable under the proposed rules:

- Employees can still buy TRICARE supplemental policies from other sources, such as insurance carriers or associations, but must do so on an individual basis. Employers can, but don't have to, provide employees with limited information about outside sources offering these policies, such as through a voluntary insurance program.
- Employers can still offer broad supplemental insurance policies that aren't designed exclusively for TRICARE beneficiaries.
- Employers can offer cash payments or other bona fide fringe benefits under the Service Contract Act in lieu of health care coverage, but TRICARE eligibility cannot affect the cash payment or fringe benefits offered an employee.

**Restrictions on cash opt-out incentives.** Under the DOD proposed rules, no employer can offer TRICARE-eligible employees cash or similar incentives to opt out of its group health coverage, except in either of two situations:

- The employee has other primary coverage besides TRICARE, such as coverage through a spouse's employer-provided health plan.
- The cash opt-out incentive is offered to all participants – not just TRICARE-eligible employees – through a qualified cafeteria plan under Section 125 of the Internal Revenue Code. For example, an employer could offer all employees opting out of its coverage a \$1,000 cash payment.



## For more information

For additional information, please contact your Mercer consultant.

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## Next steps for employers

Before finalizing the rules, the DOD is inviting feedback until May 27. Employers may want to submit comments seeking clarification of issues not addressed in the proposed rules. For example, the proposal does not address whether employees purchasing TRICARE supplemental insurance from an outside vendor can pay premiums through their employers, using either pre-tax salary reductions under a cafeteria plan or after-tax payroll deductions. Medicare does not permit employers to forward employee contributions for Medicare supplemental coverage, so unless the DOD creates a specific regulatory exception, TRICARE probably would not either.

Employers considering arrangements that are not clearly addressed in the proposed regulations may want to delay acting until final regulations are issued or consult with legal counsel. To avoid potential penalties, employers that still offer or contribute to group TRICARE supplemental coverage may need to terminate that coverage and offer affected employees a midyear opportunity to enroll in other coverage.

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