



# Benefit Trends



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## **Blue Shield 2% Pledge: Must Group Health Plan Sponsors Share the October 30% Premium Credit With Plan Participants**

### **LEGISLATIVE BRIEF**

**July 11, 2011**

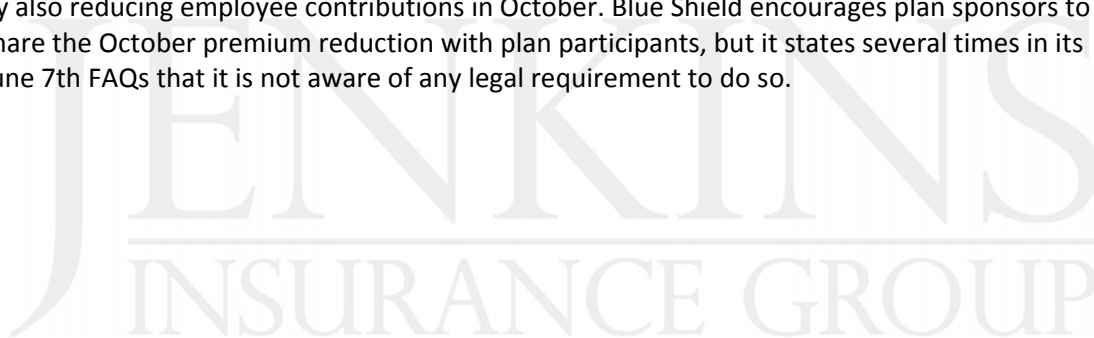
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If you offer a group health plan and Blue Shield of California is your carrier, you are no doubt aware of [Blue Shield's 2% pledge](#) under which Blue Shield will give a 30% premium credit to policyholders in October 2011. This Bulletin explains the 2% pledge ([announced on June 7, 2010](#)), and addresses the question of whether an employer who sponsors an insured group health plan that is subject to ERISA must pass the 30% premium credit on to employees who are enrolled in the Blue Shield health insurance policy under the ERISA plan.

#### **Background**

Blue Shield of California pledged that if it earns more than 2% net income in any year, Blue Shield will return the difference between what it earned and the 2% to its customers and the community. The income is being distributed to fully insured individual and group customers by giving each policyholder a 30% credit against one month of premiums. The credit will be reflected in the October 2011 premiums, and it will be given to all policyholders with fully insured coverage continuously from May 2011 through October 2011 (other than government programs whose contracts do not permit such credits).

If you are an employer who sponsors an insured group health plan that is subject to ERISA, you are the policyholder, so YOU will be receiving the premium credit in October. Some of our clients have asked whether they are legally required to share that credit with plan participants by also reducing employee contributions in October. Blue Shield encourages plan sponsors to share the October premium reduction with plan participants, but it states several times in its June 7th FAQs that it is not aware of any legal requirement to do so.



### To Share the Credit or Not?

It appears Blue Shield has tried to structure the October 30% premium credit so it will **not** be deemed by the federal Department of Labor (DOL) to be an insurance company rebate, refund, dividend or other distribution that would be a "plan asset" under ERISA that would have to be shared with plan participants who pay or paid part of the premium. **However, an employer may have contractually committed itself to share the premium credit** with participants if its SPD or any prior benefits communications to participants have stated that employees pay a specific percentage of the monthly premium.

If you are considering **not** sharing the October 2011 30% premium credit with your employees who are enrolled in your Blue Shield group health plan, you should discuss this issue with your legal counsel if your employees have paid part of the premiums. Plan participants probably will have heard about Blue Shield's 2% pledge, so there may be an employee relations issue if you do not share the credit with your employees.

### ERISA Provisions on Insurance Company Rebates, Refunds & Distributions as "Plan Assets"

The general rule (upheld by the DOL and the courts) is that an insurance company "rebate, refund, dividend or excess surplus distribution" is a "plan asset" to the extent it is attributable to coverage that was paid for in whole or in part by participant contributions. If it is a plan asset, ERISA fiduciary duty rules require that it be used for the exclusive benefit of plan participants or beneficiaries or for reasonable administrative expenses. If an employer simply deposited such a refund or distribution in its own corporate account and used it for general corporate purposes, that would be a breach of its ERISA fiduciary duty.

### Reasons the 30% Premium Credit Arguably is Not a "Plan Asset" that must be Shared with Participants

For the following reasons, it appears Blue Shield has tried to structure the premium credit so it will **not** be deemed by the DOL to be an insurance company rebate, refund, dividend or other distribution that would be a "plan asset."

- 1-- The credit is based on overall Blue Shield profitability, not on experience of any particular contract or plan or even on any particular line of business.
- 2-- Blue Shield will not refund or distribute any money to the policyholder; it is only lowering the premium due in October for policyholders who have had fully insured coverage continuously from May 2011 through October 2011. Employers do not have the option of electing to receive either a refund or a credit.

### Taxation and COBRA Issues

Blue Shield also states in its June 7th FAQs that it has not identified any reason why the credit would be taxable to the employer. The credit will only reduce the October premium and thus reduce the tax deduction the employer takes for healthcare expenses for the month of October. Blue Shield does not address the issue of whether an employer must share the credit with COBRA qualified beneficiaries in October. The COBRA premium is 102% of the "applicable premium," which for an insured plan is the rate charged by the insurance company. Employers should discuss this with their legal counsel.

## Next Steps for Employers

- 1--** Determine whether you are eligible to receive a 30% credit against your October 2011 bill: i.e., if you sponsor a fully insured group health plan through Blue Shield of California from May 2011 through October 2011.
- 2--** If you pay the entire premium, you don't have an issue. The credit only applies to you.
- 3--** If you and your employees share the premium cost for coverage under a Blue Shield health insurance policy, review your prior benefits communications and SPDs to see if they have stated that employees pay a specified percentage of the monthly premium. If so, discuss with your legal counsel whether you may have contractually committed to pass through the October 2011 premium credit to participants.
- 4--** Even if your prior communications have not stated that employees pay a specified percentage of the monthly premiums, decide whether you want to share the October 2011 30% credit with your enrolled employees. Plan participants probably will have heard about Blue Shield's 2% pledge (or even watched the YouTube video), so there may be an employee relations issue if you do not share the credit. On the other hand, your cashflow situation may dictate that you not share the credit.
- 5--** Decide whether this credit will affect the October premiums paid by any COBRA qualified beneficiaries, and if so, send a communication to your COBRA enrollees.

Click [here](#) for Blue Shield's Press Release. And [here](#) for Blue Shield's 2% pledge.

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