

BCBS Antitrust Litigation and Tentative Settlement – Impact on Group Health Plans

This material was updated on March 22, 2021, to include new information posted on the settlement website. Please refer to the BCBS settlement page and/or materials from the specific BCBS carrier for more information.

Antitrust litigation that commenced against the Blue Cross Blue Shield Association and member companies¹ in 2012 appears to be coming to a settlement. In short, plaintiffs alleged that Blue Cross Blue Shield companies across the country entered into agreements not to compete with each other for customers of health insurance. On November 30, 2020, the Court preliminarily approved a proposed settlement agreement consisting of:

- A financial settlement of \$2.67 billion; and
- Certain changes to the way the Blues do business (“injunctive relief”).

HOW WILL THE \$2.67 BILLION BE HANDLED?

The amount that remains after paying 25% in attorney’s fees and some other expenses, about \$1.9 billion, will be distributed to eligible class members, including employers² with insured or self-funded plans and their employees that purchased or were enrolled in a Blue-Branded Commercial Health Benefit Product during the following period:

- Insured groups: February 7, 2008 through October 16, 2020.
- Self-funded plans: September 1, 2015 to October 16, 2020.

The bulk of this \$1.9 billion (93.5%) goes to insured plans. The “Long Form Notice” provides formulas for distribution of the fully insured fund and the self-funded fund. A claim payment to fully insured authorized claimants is determined as follows (with a similar formula for self-funded claimants based on administrative fees paid rather than premiums paid):

<p>Total Premiums Paid During the Settlement Class Period by FI Authorized Claimant A</p> <p>Divided by</p> <p>Total Premiums Paid during the Settlement Class Period by all FI Authorized Claimants who submit claims</p> <p>Multiplied by</p> <p>Total dollars in FI Net Settlement Fund</p> <p>= Claim payment of FI Claimant A’s claim</p>

Note that employees covered under group plans can submit claims on their own with respect to coverage under an employer-sponsored plan, and, if eligible, they receive their claim payment directly.

¹ It appears there are 36 member companies according to the state-by-state list of “Blue Cross Blue Shield Companies,”

<https://www.bcbs.com/bcbs-companies-and-licensees>

² This does not include any “government account,” which is defined in the Settlement Agreement. Generally, this will include an account of a state, county, municipality, Native American tribe, or federal government, and any entity that, by law, must provide health coverage under a BCBS arrangement through any such account. Thus, for example, an account for a county school district that maintains its own account, and not through the county would not be a government account.

HOW WILL EMPLOYERS BE NOTIFIED ON HOW TO PROCEED?

Anyone can now access the Settlement's "[Long Form Notice](#)."

Blues Members were to provide the "notice and claims" administrator with information on possible class members, which apparently can include employees. By Spring 2021, the administrator is to distribute the notice, or at least information on how to access the notice, out to employers and other class members, including employees, by email and postcard and a variety of other ways. Anyone, including employers, also could have registered to receive notices and other correspondence by providing their name, street address and email address to BCBSnotice@BCBSsettlement.com. Despite the Long Form Notice currently being available to anyone, a robust campaign to distribute the Long Form Notice is still expected.

The Long Form Notice includes information on various deadlines and other important information.

HOW DO CLAIMANTS FILE THEIR CLAIM?

All employers wishing to file a claim must do so affirmatively. Employees may file their own claim. For those who do not do so, the employer will apparently receive their interest.

Employers may want to consider informing their employees about the settlement and the ability for them to file their own claims directly, although there is no specific requirement to do so.

A [Claim Form](#) is now available.

Claims can be filed online. For employers, key information to have available includes:

- The name(s) of the relevant Contracted Blue Cross or Blue Shield Branded Health Plan(s)
- Relevant Blue Cross or Blue Shield Group number(s)
- Start and end dates of relevant coverages

Also note that the Claim Form itself does not require information relating to actual dollar amounts paid by any claimant towards fully insured premiums or self-funded plan administrative fees.

HOW ARE DISTRIBUTIONS HANDLED?

An employer filing a claim on behalf of its plan should receive a pro-rata settlement distribution that should be allocated between employer and employees based on default allocation ratios (e.g., 85% to employer and 15% for employee on single coverage fully insured coverage). However, either the employer or one or more employees can request an "Alternative Option" (e.g., the employer believes it contributed 95% toward relevant coverage for single coverage and requests a 95% allocation). An Alternative Option request must include documentation supporting the percentage alleged to be contributed, which might include actual proof of total premiums paid during relevant periods, with the separate portion actually paid by the party requesting the Option. The Long Form Notice includes a chart describing numerous scenarios pertaining to distribution of the fully insured fund as between employers and employees. An FAQ indicates that an employer is not obligated to share any recovery with its employees. However, it appears any portion of an employer recovery potentially attributable to employee contributions would be subject to ERISA considerations, which may involve sharing a recovery with certain employees.

WHAT ARE THE OPTIONS FOR EMPLOYERS?

- File a claim by November 5, 2021
 - Online or by mail
 - Employer will be bound by the settlement
 - Employer will give up right to sue or continue suing defendants for claims in the case
- Do nothing
 - Employer will receive no payment
 - Employer will be bound by the settlement
 - Employer will give up right to sue or continue suing defendants for claims in the case
- Opt out by July 28, 2021
 - Employer is removed from the Class
 - Employer will receive no payment
 - Employer retains right to sue or continue to sue defendants for claims in the case
 - Employees can still file a claim and possibly receive payment
 - Specific information is included in FAQs on the settlement website
 - Given the size of the net settlement, it would appear that “going on your own” would be cost-prohibitive
- Object in writing to the court by July 28, 2021
 - Specific information is included in FAQs on the settlement website
- Attend hearing October 20, 2021 at 10:00 am Central Time

There are third parties offering services to employers who are seeking their settlement distributions. These third parties usually take a percentage of the employer’s settlement (e.g., 20%) for their services. It is unclear what additional value signing up with a third party brings.

WHAT IS THE TIMING OF ALL THIS?

- Spring 2021 – Settlement notice to be sent to eligible class members, though the notice is available now, and claims filing is open. It may be advisable to wait until getting the “unique ID” to avoid confusion.
- October 20, 2021 – Settlement final approval hearing
- November 5, 2021 – Claims filing deadline, apparently subject to change
- Early 2022 – Distribution to settlement class members, which may be by check, pre-paid card, Venmo, or PayPal

HOW DO EMPLOYERS GET ADDITIONAL INFORMATION?

Employers can visit the following website for additional information: <https://www.bcbssettlement.com/>. As of March 19, 2021, the website was updated to include the following:

- Information on how to get a claim started, including filing a claim online
- Key dates clarified
- Important documents in final form: Long Form Notice and Claim Form
- FAQs updated

This summary is intended to convey general information and is not an exhaustive analysis. This information is subject to change as guidance develops. Emerson Reid does not provide legal or tax advice. For advice specific to your situation, please consult an attorney or other professional.

HOW WILL THE INJUNCTIVE RELIEF IMPACT EMPLOYERS?

The proposed settlement may result in increased competition by doing both of the following:

- Dropping a rule that 2/3 of each member company's national revenue from health plans and related services come from Blue-branded businesses.
 - That change could increase competition among the companies if they choose to expand their non-Blue lines of business in one another's geographic territories.
- Relaxing rules requiring national employers to choose a plan based on their headquarters.
 - Certain large, self-funded national employers would be able to also request a bid from a second Blue insurer of their choice. For a list, please visit: <https://www.bcbsettlemnt.com/secondbluebid>

This information provides a high-level summary only.