

Update

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Employer plans and Medicare: Who pays first and when?

Summary

Under the Medicare secondary payer (MSP) program rules, employer group medical plans are the primary payer of medical benefits for certain Medicare-covered individuals with employer health coverage. As the rules have evolved since the 1980s, they have become more complex, shifting more of Medicare beneficiaries' costs to employer plans and prohibiting employer actions that would increase the primary payment burden on Medicare. Employers that don't apply the rules correctly may find themselves in debt to the Medicare program and subject to aggressive collection efforts by the Centers for Medicare and Medicaid Services (CMS) and the Treasury Department. This *Update* gives a brief overview of how the MSP rules shift responsibility to employer health plans as the primary payer of medical claims in certain situations and highlights some of the prohibitions imposed on employers.

How does the MSP program work?

The MSP program does exactly what its name implies – it makes Medicare the secondary payer of medical claims when a Medicare beneficiary also has coverage under another health plan. But the MSP rules also ensure that employers don't operate their plans in a way that would make Medicare the primary payer for individuals who should have employer primary coverage.

Why is this important? Over the last few years, CMS has implemented a more focused approach to determining which health plan is the primary medical benefit payer. More employers are receiving notices that their plans should be paying first. Unless the employer can provide proof that the plan actually was the primary payer or that it wasn't obligated to be the primary medical benefit payer, CMS treats the amount of the claim as a debt owed and accruing interest. If an employer fails to timely pay the debt, CMS will begin a collection process. If collection efforts fail, CMS will refer the debt to the Treasury Department, which can collect it or offset other federal payments owed to the employer by the amount of the unpaid debt.

What else do the MSP rules require?

The MSP rules include many dos and don'ts. Below, we outline how different scenarios fare under the MSP rules. Penalties can include fines up to \$5,000 per violation.

Prohibited

Taking Medicare into account for benefit purposes. Medicare-covered individuals must be offered the same plan as all other covered individuals. Employers can't offer to sponsor or pay for a Medicare supplemental plan or terminate employer coverage when someone becomes covered by Medicare.

Incentives to drop the employer plan. Employers can't provide financial or other incentives to Medicare-covered employees or family members to drop or not enroll in the employer's plan and make Medicare their primary payer.

Benefit and contribution differentials. Medicare-covered individuals can't receive different or less valuable employer coverage, be charged more for the employer's plan, or be subject to longer waiting periods.

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How type/duration of Medicare and employer size affect order of payment

Employee or family member status	Employer size or duration of Medicare	Primary plan	Secondary plan
Medicare beneficiary based on age also covered by an employer group health plan through own or spouse's current employment (working aged)	Fewer than 20 employees	Medicare	Employer plan
	20 or more employees	Employer plan	Medicare
Medicare beneficiary based on age or Social Security disability also covered by an employer retiree medical plan	Any number of employees	Medicare	Employer retiree plan
Medicare beneficiary based on Social Security disability also covered by an employer group health plan through own or family member's current employment	Fewer than 100 employees	Medicare	Employer plan
	100 or more employees	Employer plan	Medicare
ESRD Medicare beneficiary also covered by an employer group health plan	In first 30 months of eligibility or entitlement to Medicare*	Employer plan	Medicare
ESRD Medicare beneficiary with COBRA coverage	In first 30 months of eligibility or entitlement to Medicare*	COBRA	Medicare
Medicare beneficiary based on age or Social Security disability with COBRA coverage	Any number of employees	Medicare	COBRA

* After 30 months, order reverses and Medicare becomes the primary payer.

Who qualifies as a Medicare beneficiary? The most common way people get Medicare coverage is by reaching age 65 and collecting Social Security income benefits. Active employees and their spouses who receive Medicare benefits based on age are called the “working aged.” But younger people can also qualify for Medicare. People with disabilities who receive 24 months of Social Security disability benefits are automatically eligible for Medicare coverage. And individuals of any age with end-stage renal disease (ESRD) – those on kidney dialysis – can receive Medicare coverage.

Which Medicare beneficiaries are covered by MSP rules? The MSP rules apply to working aged active employees and their spouses (but not domestic partners). Certain disabled and ESRD Medicare beneficiaries who are active employees are also covered, as are family members (including domestic partners) of active employees. Former employees (and family members) covered by an employer plan aren’t subject to the MSP rules when Medicare is based on age or Social Security disability.

Which employers are affected? The MSP provisions apply differently to different employers for each category of Medicare beneficiary. For working aged and disabled Medicare beneficiaries, whether the employer plan or Medicare pays medical claims first depends on the size of the employer and whether the individual’s coverage is based on current employment (his or her own or a family member’s). For ESRD Medicare beneficiaries, primary payer status is based on the number of months the individual has had Medicare; employer size and current employment status don’t matter.

What is the significance of “current employment”? The employer plan is the primary medical claims payer for working aged and Social Security disability beneficiaries if the Medicare-covered individual’s coverage arises from their own or a family member’s current employment. Generally, current employment means the individual is actually working for the employer. Medicare would be the primary claims payer for employees or family members receiving COBRA benefits or covered by a retiree’s or disabled employee’s medical plan, because the employer coverage doesn’t flow from their current employment.

What are the special considerations for ESRD? The current employment rules don’t apply for ESRD. That means the employer’s plan is the primary payer even for former employees and family members on COBRA, as long as the individual is in the first 30 months of Medicare coverage. Special rules apply to retirees older than 65 who develop ESRD after they have already retired; in that situation, Medicare would continue to be the primary payer.

Grey area

Spousal surcharges. Some plans impose a higher contribution for spouses or domestic partners who have access to their own employers’ plans. It’s not clear whether these surcharges can be applied to a spouse or family member if the other coverage is Medicare.

Permitted

Broad eligibility rules. Broad eligibility and participation requirements can be required if applied to all participants. For example, a six month waiting period applied regardless of Medicare status is permitted.

Cafeteria plan waivers.

Informally, CMS has indicated that a broadly available cash waiver option under a cafeteria plan, offered to all employees who decline participation in the employer health plan, would not violate the MSP rules.

Terminating COBRA coverage

because of Medicare coverage. Federal rules allow employers to terminate COBRA coverage when the qualified beneficiary first becomes covered by Medicare after electing COBRA.



For more information

For additional information, please contact your Mercer consultant.

*This **Update** is for information only and does not constitute legal advice; consult with legal and tax advisers before applying this information to your situation.*

Conclusion

The MSP rules are wide-ranging and extremely complicated. Employers sponsoring group health plans should work with advisers to be certain their plans are properly coordinated with Medicare. Starting in 2009, insurers and third-party administrators will be required to give CMS comprehensive information about group health plan participants and their Medicare status. Through this mandatory process, CMS aims to eliminate situations in which Medicare mistakenly becomes the primary payer. In the meantime, employers must respond to CMS inquiries about potential MSP claims in a timely manner to avoid financial penalties for late payment.

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