

MEDICARE SECONDARY PAYER

(Outline for May 17, 2007 Medicare Secondary Payer Teleconference)

I. AUTHORITY

- A. Statutory: 42 USC 1395y(b).
- B. Regulatory: 42 CFR, Part 411.
- C. Administrative: Medicare Secondary Payer Manual,
www.cms.hhs.gov/Manuals/IOM/list.asp

II. REQUIREMENTS OF GROUP HEALTH PLANS

- A. Medicare Entitlement Based on Age (Working aged)
 - 1. General rule: GHP may not take into account that an individual (or individual's spouse) is entitled to Medicare on the basis of age. GHP must provide the same benefits under the same conditions to an employee age 65 or older (and spouse age 65 or older of any individual) as it provides to any individual (or spouse) under age 65 if:
 - a. Employer has 20 or more employees; and
 - b. Individual is covered under the GHP by virtue of the individual's current employment status or the current employment status of a spouse. 42 USC 1395y(b)(1)(A); 42 CFR §§ 411.170-411.175.
 - 2. 20 or more employee threshold: An employer must have at least 20 full and/or part-time employees for each working day in each of 20 or more calendar weeks, not necessarily consecutive, in the current calendar year or the preceding calendar year. Once that threshold is met, the GHP is primary for the remainder of that calendar year and throughout the following year.
 - 3. Rule for multi-employer plans: If the GHP is a multi-employer plan, the GHP is primary to Medicare for all member employers if at least one of the member employers has 20 or more employees. The GHP may request an exception for employer members with fewer than 20 employees.

4. Refusal to accept GHP coverage: An employee or spouse may refuse GHP coverage. Medicare is primary for that individual and the employer may not offer coverage complementary to Medicare.

B. Medicare Entitlement Based on Disability

1. General rule: GHP may not take into account that an individual (or member of the individual's family) is entitled to Medicare on the basis of disability and must pay primary to Medicare if:
 - a. Employer has 100 or more employees (large group health plan); and
 - b. Individual is covered under the LGHP by virtue of the individual's current employment status or the current employment status of a member of his or her family. 42 USC 1395y(b)(1)(B); 42 CFR §§ 411.200-411.206.
2. 100 or more employee threshold: An employer must have employed at least 100 full and/or part-time employees on a typical business day during the previous calendar year (i.e., 50 percent or more of its business days). If the threshold is met, the LGHP is primary for the following year.
3. Rule for multi-employer plans: If the GHP is a multi-employer plan, the GHP is primary to Medicare for all member employers if at least one of the member employers has 100 or more employees. An employer with fewer than 100 employees is not eligible for an exception as is the case with the working aged situation.
4. Family members may include a spouse (including a divorced or common-law spouse), a natural, adopted, foster, or stepchild, a parent, or a sibling.

C. Medicare entitlement based on End Stage Renal Disease (ESRD)

1. General rule: GHP may not take into account that an individual is eligible for or entitled to Medicare on the basis of ESRD during the coordination period. A GHP may not differentiate in the benefits it provides between individuals who have ESRD and others enrolled in the plan, on the basis of the existence of ESRD, the need for renal dialysis, or in any other manner. 42 USC 1395y(b)(1)(C); 42 CFR §§ 411.160-411.165.

- a. GHP is primary during the coordination period irrespective of the size of the employer; and
 - b. GHP is primary during the coordination period irrespective of the individual's or other family member's employment status.
2. Coordination period: A 30-month period starting with the earlier of the first month the individual is entitled to or eligible for Medicare based on ESRD. (Eligibility means the person meets the legal requirements for Medicare benefits; entitled means the person has submitted an application for Medicare benefits and been approved.)
3. Differentiating in benefits: The prohibition against differentiating in benefits applies during both the coordination period and after. GHP actions that constitute differentiation in benefits include (not exhaustive):
 - a. Terminating coverage for ESRD individuals for reasons that would not result in termination for individuals who do not have ESRD;
 - b. Imposing benefit limitations on persons who have ESRD, but not on others enrolled in the GHP, e.g., less comprehensive coverage, higher deductibles/copayments, longer waiting periods, lower annual or lifetime benefits, more restrictive pre-existing illness limitations;
 - c. Charging individuals with ESRD higher premiums.
4. During the coordination period, the GHP is primary for all of the ESRD individual's medical care, not simply the care related to treatment of ESRD. Following the coordination period, Medicare is primary for the all of the individual's medical care, not simply the care related to the treatment of ESRD.

III. Key Terms

- A. Group health plan; large group health plan: For purposes of MSP, these terms have the meaning given them in Section 5000 of the Internal Revenue Code, 26 USC §5000. See also, 42 CFR §411.101.
- B. Current employment status: A person has current employment status if:

1. “The individual is actively working as an employee, is the employer (including a self-employed person), or is associated with the employer in a business relationship; or
2. The individual is not actively working and—
 - a. Is receiving disability benefits from an employer for up to 6 months (the first 6 months of employer disability benefits are subject to FICA taxes); or
 - b. Retains employment rights in the industry and has not had his employment terminated by the employer, if the employer provides the coverage (or has not has his membership in the employee organization terminated, if the employee organization provides the coverage), is not receiving disability benefits from an employer for more than 6 months, is not receiving disability benefits from Social Security, and has GHP coverage that is not pursuant to COBRA... Whether or not the individual is receiving pay during the period of nonwork is not a factor.” 42 CFR §411.104. (See this section of CFR for additional explanations of current employment status and special employment situations.)

C. “Taking into account” entitlement to Medicare: Examples (not exclusive) of actions by GHPs and LGHPs that constitute “taking into account” include:

1. Failure to pay primary benefits as required under MSP;
2. Failure to pay primary benefits as required by MSP;
3. Terminating coverage because the individual has become entitled to Medicare, except as permitted under COBRA;
4. Imposing limitations on benefits for a Medicare entitled individual that do not apply to others enrolled in the plan;
5. Charging a Medicare entitled individual higher premiums.

(See 42 CFR §411.108 for additional examples of what constitutes “taking into account”.)

IV. Recovery Process

- A. “Responsible entity”: United States may recover payments it made as primary from “any or all entities that are or were required or responsible (directly, as an insurer or self-insurer, as a third-party administrator, as an employer that sponsors or contributes to a group health plan, or large group health plan, or otherwise) to make payment... 42 USC 1395y(b)(2)(B)(iii).
- B. Medicare Secondary Payer Recovery Contractor (Chickasaw Nations Industries, Inc.- Administrative Services LLC.) issues a recovery demand letter to the employer with a copy to the insurer/TPA, if known.
- C. If employer fails to respond, matter can be referred to the Department of Justice for legal action and/or the Department of Treasury for collection action.
- D. Interest accrues from the date of the demand letter, but is assessed only if the debt is not repaid or otherwise resolved within 60 days of the date of the letter.

V. Employer Penalties

- A. United States may recover double damages for claims paid out as primary. 42 USC 1395y(b)(2)(B)(iii).
- B. United States may impose an excise tax of 25% on the amount of employer’s contribution to group health plan. 42 USC 1395y(b)(3)(B).
- C. Private cause of action for double damages in the case of a primary plan that fails to make primary payment. 42 USC 1395y(b)(3)(A).

(This outline contains general information and should not be construed as either legal advice or opinion on any specific facts or circumstances.)