

Medicare Secondary Payer Rules

The Medicare Secondary Payer (MSP) rules impose regulations on group health plans that govern how plans interact with Medicare and Medicare-entitled plan participants. While complex, the rules are designed to spread costs between Medicare and group health plans that are considered primary payer to Medicare. Employer-sponsors of group health plans that are subject to the MSP rules must comply with the various requirements to ensure the appropriate payment of claims and avoid costly penalties.

Who is Subject to the Rules?

Private-sector employers, religious institutions, and federal and state governments are all subject to the MSP rules. Small employers, however, are granted an exception. Small employers are those that employ fewer than 20 employees on each working day in 20 weeks in both the prior and current calendar years. To determine employer size, all employees must be counted, including part-time employees and employees of employers that make up a controlled group. For employers that participate in a multiemployer or multiple employer plan, the MSP rules will generally apply if at least one employer in the plan has 20 or more employees.

The rules apply to the treatment of current employees, as well as their spouses and dependents, who are entitled to Medicare. An individual can become entitled to Medicare based on age, disability, or end-stage renal disease.

What Do the Rules Require?

Unless an employer qualifies for the small employer exception, it must administer its group health plan in accordance with the MSP rules (for purposes of the rules, a group health plan includes insured plans, self-insured plans, and Health Reimbursement Arrangements). The rules are nuanced and vary based on the reason an individual is entitled to Medicare, but there are three major components that broadly apply.

- ✓ **Requirement to Provide the Same Coverage under the Same Conditions:** Group health plans must provide to current employees and spouses who are age 65 or older the same coverage under the same conditions that are provided to employees and spouses who are under age 65.

- ✓ **Prohibition on the Taking into Account of Medicare Entitlement:** Group health plans are prohibited from taking into account the Medicare entitlement of a current employee or a current employee's spouse or dependent. Failing to pay primary benefits, charging higher premiums, applying longer waiting periods, excluding Medicare-entitled dependents, and terminating coverage upon entitlement to Medicare constitute the prohibited taking into account of Medicare entitlement.
- ✓ **Prohibition on the Offering of Incentives:** Employers are prohibited from offering any sort of incentive, financial or otherwise, in an effort to discourage Medicare-entitled employees from enrolling in the group health plan. Prohibited incentives can be made orally or in writing, to one or multiple Medicare-entitled employees.

How can Employers Comply?

In general, employers that are subject to the MSP rules should take care to establish and administer group health plans that treat Medicare-entitled employees the same as employees not entitled to Medicare. A plan that provides more, fewer, or different benefits to Medicare-entitled individuals, or that applies different eligibility standards to Medicare-entitled individuals, will likely run afoul of the MSP rules.

A violation of the MSP rules can take many forms. For example, an arrangement that pays for or reimburses the Medicare premiums of current employees violates the MSP rules - whether or not it's offered on a tax-free basis. Similarly, an employer that offers money to Medicare-entitled employees in exchange for those employees waiving coverage under the group plan also violates the rules. Importantly, though, informal guidance indicates that no violation of the MSP rules occurs where employees entitled to Medicare have the same rights as employees not entitled to Medicare under a bona fide cash-out or cash-in-lieu arrangement offered under a cafeteria plan.

How are the Rules Enforced?

The Centers for Medicare and Medicaid Services (CMS) uses certain reporting mechanisms, known as the MSP mandatory reporting requirements, to gather information from group health plans and track payments made by Medicare to beneficiaries who are, or whose spouse is, currently employed. CMS has the ability to recover mistaken Medicare primary payments, and an action may be brought against any employer or group health plan that is responsible for making primary payment.

Additionally, financial penalties can be imposed where MSP rules are violated. A violation of the prohibition on the offering of incentives can incur a penalty of up to \$8,908, which is triggered each time a prohibited incentive is offered. Excise taxes under the Internal Revenue Code can also be applied against employers with plans that fail to comply with the MSP rules.



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