COMMERCIAL INSURANCE
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Q&A FROM ASSUREX GLOBAL WEBINAR

EMPLOYEE BENEFITS AND MEDICARE COORDINATION ISSUES

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Q. The Medicare eligible employee has to meet the minimum hours worked per week to stay on the company health plan, correct?

A. Generally Medicare-eligible employees would have to meet the same eligibility requirements as any other employee to participate in the employer's group health plan.

Q. What is an employer's responsibility to know about Medicare enrollment for purposes of HSA-eligibility?

A. For purposes of HSA-eligibility, employers have limited responsibility for determining whether an employee's HSA contribution is excludable. IRS guidance provides that employers are responsible for determining only the following with respect to an employee's eligibility and maximum annual contribution limit for HSA contributions: (1) whether the employee is covered under an HDHP sponsored by that employer; (2) whether the employee is covered under a non-HDHP (including health FSAs and HRAs) sponsored by that employer; and (3) the employee's age (for catch-up contributions). That being the case, it is certainly worthwhile to provide participants with information about who is considered HSA-eligible and how annual contribution maximums are calculated.

Q. Can an employee enrolled in Medicare who also has an HDHP family plan contribute to his HSA for his younger spouse who is not enrolled in Medicare?

A. While the employee, who is enrolled in Medicare, would not be eligible to open and/or contribute to an HSA (even on his spouse's behalf), the spouse could open his/her own HSA and contribute up to the full family annual contribution amount assuming the spouse is enrolled in a qualifying HDHP and does not have any other disqualifying coverage.

Q. Can't HSAs be used for COBRA or Medicare Supplemental Premiums?

A. HSAs may generally not be used to reimburse insurance premiums. However, there is an exception for the following:

- Continuation coverage under federal law (e.g., COBRA or USERRA coverage) for the HSA holder or for his or her spouse or dependents;
- A qualified long-term care insurance contract;
- Any health plan maintained while the individual (i.e., the HSA holder or his or her spouse or dependent) is receiving unemployment compensation under federal or state law; or
- For HSA holders age 65 or over (whether or not they are entitled to Medicare), any deductible health insurance (e.g., retiree medical coverage) other than a Medicare supplemental policy.

Q. Can you explain or define what a "creditable health plan" would be?

A. Prescription drug coverage is creditable if the actuarial value of the coverage equals or exceeds the actuarial value of standard prescription drug coverage under Medicare Part D. Often an insurance carrier or administrator will provide information to an employer detailing if a plan's drug coverage is creditable or not. If not, the employer must make the determination. Employers not applying for the subsidy for qualified retiree prescription drug plans may use a simplified method for determining if the drug coverage in a plan is creditable, but if the plan does not meet the standards under the simplified method, it may be necessary to obtain an actuarial determination.

Q. Maybe you said this but Medicare eligible doesn't necessarily mean someone is Enrolled. So just because they turned 65 doesn't mean they are enrolled in Medicare- can they still then get or keep COBRA?

A. Correct. Eligibility for Medicare, alone, will not allow the COBRA continuation coverage maximum period to be shortened. The individual must become both eligible and enrolled ("entitled") following the election of COBRA continuation coverage to have the maximum coverage period effected.

NOTE - Medicare Part A enrollment is automatic for most individuals (i.e., those who are already receiving Social Security (age 62-67)). These individuals simultaneously become eligible, enrolled, and entitled upon reaching Social Security eligibility. However, other individuals become eligible for Medicare, but must file an application in order to become enrolled in benefits (e.g. working individuals who have attained age 65 and are eligible to receive Social Security benefits but have not applied for them).

Q. If an employer was over 20 employees but under 50 employees and did not offer group medical then Medicare would only pay if the member qualified for Medicare. correct?

A. Correct. Medicare is available only to those individuals who are eligible and enrolled ("entitled") to Medicare.

Q. On the disability-based Medicare entitlement, is that a 100 employees total or 100 employees which are eligible for insurance?

A. 100 employees total. When counting the 100 or more employees for purposes of the Medicare Secondary Payer (MSP) rules, the employer must count all common law employees, including part-time employees, and must include employees of all employers who are part of the same controlled group or affiliated service group under §414 rules. However, self-employed individuals (e.g. sole proprietors, partners, 2% or more shareholders in an S-Corp), who are exempt from FICA taxes, are not counted.

Q. Is it enrollment in any part of Medicare that disqualifies them from HSA? Like Part A?

A. Yes. Enrollment in any portion of Medicare will disqualify the individual from being able to make HSA contributions.

Q. Can Medicare enrolled employees enroll in an HRA tied to a HDHP?

A. Yes, so long as an individual meets the plan eligibility rules. There aren't any rules prohibiting individuals who are enrolled in Medicare from participating in an HRA like there are for HSAs.

Q. Can the employer Contribute to the HSA if the individual is Medicare eligible?

A. An otherwise eligible individual is not ineligible to contribute to an HSA until the individual actually enrolls (i.e. becomes entitled) to Medicare. Mere eligibility for Medicare does not make an individual ineligible to contribute to an HSA.

Q. Medicare eligible employee did not elect Part B when turning 65 because they were actively working and have active employer coverage. The employee was terminated, due to lay-off, and enrolled in COBRA. Insurance carrier is saying that Medicare Part B is primary to COBRA even though they do not have Part B. Medicare Part B application takes time and have future effective date, so all claims between the time they are terminated until Part B is effective, the health plan is paying secondary to Medicare and the person is owing a lot of money. Seems to be a big Medicare rule most do not know.

A. Agreed. When the Medicare Secondary Payer (MSP) rules require Medicare to be primary (e.g. retiree or COBRA coverage), oftentimes insurance carriers will choose either not to provide coverage or to pay secondary regardless of whether Medicare coverage is actually in place. This is something individuals should take into consideration when determining whether or not to delay Medicare coverage.

Q. Can a spouse contribute to the HSA too?

A. While HSA contributions may generally be made by the HSA account holder or by any other person, including an employer or family member, the total amount that may be contributed to the account holder's HSA will be based on the level of HDHP coverage in place for the account holder. If the employee is enrolled in family HDHP coverage, it may not whether both spouses contribute to the same HSA or open separate accounts and divide the family annual maximum contribution between them. On the other hand, if both spouses are enrolled in single HDHP coverage, they would each have to open separate accounts in order to each contribute up to the single annual maximum (e.g. $3,400 per spouse).

Q. If a person is enrolled in Part A only but did not enroll in B or D, would the premiums being paid for the employer plan in lieu of B or D, still able to be deducted on a pre-tax basis?

A. Yes. Eligibility for Medicare should not affect whether contributions toward the employer's group health plan may be handled on a pre-tax basis.

Q. Does the employee request the correction of over contributions through the HSA vendor? Or the employer?

A. If excess contributions made to the HSA for a taxable year are paid to the account beneficiary before the tax filing deadline (typically April 15th), then the individual may avoid the excise tax (although the net income attributable to the excess contributions will be included in the individual's gross income for the taxable year in which the distribution is received). The employee would need to notify the HSA trustee/custodian of the excess contribution and request a distribution of the excess amount and attributable earnings (since these will be taxable). The trustee/custodian will report the distribution on Form 1099-SA, coded as an excess contribution. If the employer doesn't include the excess contributions as the employee's wages on the W-2, the employee should report this amount as "other income" on her federal income tax return for 2016.

Q. If a full-time employee who is over age 65 and on the group plan goes to part-time status and loses eligibility, when does Medicare become the primary plan? Is it the month the employee becomes entitled to Medicare?

A. If the employee is no longer eligible for and enrolled in the employer's group health plan there is no coordination of benefits. Medicare would pay primary once the employee enrolled. However, if the employee is eligible for and chooses to be enrolled in both the employer's group health plan and Medicare simultaneously, the Medicare Secondary Rules (MSP) determine which plan pays primary as follows:

- When Medicare entitlement is age-based
  - Employers with 20 or more employees, group health plan is primary
  - Employers with fewer than 20 employees, group health plan is secondary
- When Medicare entitlement is disability-based
  - Employers with 100 or more employees, group health plan is primary
  - Employers with fewer than 100 employees, group health plan is secondary
- If retiree coverage is involved, then Medicare is primary

Q. Are MSP rules based off 20 employees total or 20 eligible for health benefits?

Do you count non-owners, e.g., more than 2% S-corp, partners and/or members of an LLC?

A. When counting the 20 or more employees for purposes of the Medicare Secondary Payer (MSP) rules, the employer must count all common law employees, including part-time employees, and must include employees of all employers who are part of the same controlled group or affiliated service group under §414 rules. However, self-employed individuals (e.g. sole proprietors, partners, 2% or more shareholders in an S-Corp), who are exempt from FICA taxes, are not counted.

Q. I'm new to the EPP. Did I understand correctly that this could only apply to groups with less than 20 employees?

A. Based on guidance issued jointly by the three agencies (DOL, IRS and HHS), employers of all sizes are currently prohibited from reimbursing employees for individual health insurance, regardless of whether the reimbursement is handled on a pre-tax or after-tax basis. This would generally include reimbursement of Medicare premiums as well, unless certain requirements are met.

Q. If a person who is eligible and enrolled in Medicare has an active HSA account, but not contributing to it, can they use the HSA balance?

A. Yes. Reimbursement from an HSA is not dependent upon HSA-eligibility. Once the HSA is established, the funds may generally be used to reimburse qualifying medical expenses for the account holder, as well as the account holder's spouse and other tax dependents until the funds are exhausted.

Q. Is there a penalty for not reporting to CMS?

A. The only specified penalty for failing to report to CMS relates to a retiree plan attempting to receive the retiree drug subsidy… such a plan would be denied the subsidy if it had not complied with the required Medicare Part D notifications. That being said, reporting is required and we would advise to report. If reporting to CMS is not performed in accordance with the requirements, there is no specific penalty that would apply, but we cannot guarantee that there is no risk to the employer, and it could cause employee relation issues. Late enrollment penalties are applied to those who have a gap without creditable coverage.

Q. We EE+Spouse HDHP coverage, but only Single or Family HSA contribution options. Can I still contribute at the Family HSA level?

A. Yes. An individual enrolled in anything other than self-only (single) HDHP coverage, who is otherwise eligible to contribute to an HSA, may contribute up to the family annual maximum subject to the special rule for married individuals, which provides that if either spouse has family coverage, then both spouses are treated as having only that family coverage; in other words, if both are HSA-eligible, the HSA contribution limit calculated under the special rule is a joint limit, which is to be divided equally between them (unless they agree on a different division).

Q. HSA Exception for age 65 account holder – what is meant by "other than a Medicare supplemental policy" on slide 24?

A. Medicare supplemental policies include things such as Medigap and Medicare Advantage plans. However, for those enrolled in Medicare, it likely also includes other types of supplementary coverage, which is generally described as additional insurance to cover the extras (e.g. copays or deductibles, dental or vision coverage, etc.) that are not covered by the individual's primary medical coverage.

Q. Does dropping group coverage mid-year for Medicare create a COBRA event for family members?

A. Generally, no. Under COBRA, when an employee becomes entitled to Medicare, the dependents (not the employee) experience a qualifying event only if the employee actually loses eligibility for the employer's plan upon eligibility for Medicare. However, in most cases, the employee has the option to continue the employer's group health plan along with electing Medicare, so the dependents would not have a right to COBRA continuation coverage even if the employee voluntarily decides to drop the employer's plan. In other words, if the entitlement to Medicare actually causes the employee to lose eligibility under the group health plan, then any spouse and/or dependents that lose coverage would have a right to COBRA. However, if the employee is voluntarily dropping the group health plan, there is no COBRA event for the employee, spouse and/or dependents.

Q. Can an HSA be used to pay for COBRA or Long Term Care premiums?

A. HSA funds are generally not allowed to reimburse insurance premiums on a tax-favored basis (as "qualifying medical expenses"), except for:

- continuation coverage under federal law (e.g., COBRA or USERRA coverage) for the HSA holder or for his or her spouse or dependents;
- a qualified long-term care insurance contract;
- any health plan maintained while the individual (i.e., the HSA holder or his or her spouse or dependent) is receiving unemployment compensation under federal or state law; or
- for HSA holders age 65 or over (whether or not they are entitled to Medicare), any deductible health insurance (e.g., retiree medical coverage) other than a Medicare supplemental policy.

Q. What happens when a Medicare eligible employee is enrolled in COBRA and does not choose to enroll in Medicare?

A. Generally, if an individual does not enroll in Medicare when he or she is first entitled to it, the individual must pay more when he or she ultimately does enroll. A special enrollment period is available for those who did not enroll in Medicare when first entitled because they had coverage under a group health plan due to their current (or their spouse's current) employment status. Individuals enrolling during a special enrollment period do not have to pay the increased premiums. However, COBRA coverage is not considered a group health plan based upon current employment. Individuals who do not enroll in Medicare when first eligible will not have special enrollment rights under Medicare and may expect to pay more for Medicare when COBRA coverage ends.

Q. Can an employer prohibit employees that reach a certain age, such as 65, from participating in a HDHP or HSA?

A. Generally, no. Medicare Secondary Payer (MSP) rules, which apply to employers with 20 or more employees, require that employees age 65 and older be offered the same benefits and not be incentivized not to take the employer's group health plan. Therefore, employers with 20 or more employees would violate MSP rules if carving out employees who are age 65 or older for plan eligibility purposes.

Q. How does the employer know that a COBRA enrollee enrolls in Medicare?

A. There is no formal requirement for COBRA participants to notify the plan administrator of becoming entitled to Medicare. However, plans could require notice of Medicare entitlement. In addition, the plan administrator could take proactive steps such as sending a letter to those who are approaching their 65th birthdays and likely to become entitled to Medicare. If no response is received about Medicare status, the plan administrator might choose to assume that Medicare entitlement has occurred and terminate COBRA coverage.